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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, ET AL, .
PLAINTIFFS, .
vs. . DOCKET NO. 5:18-CV-555-XR
UNITED STATES OF AMERICA, .
DEFENDANT. .

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
APRIL 13, 2021

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OFFICIAL COURT REPORTERS
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 (San Antonio, Texas; April 13, 2021, at 9:00 a.m., in open
2 court.)

3 THE COURT: Good morning, ladies and gentlemen.
4 We'll resume with the trial today. All counsel, parties,
5 witnesses, participants, and members of the public are
6 reminded that this is a formal proceeding, and that they
7 should behave at all times as if they were present in the
8 courtroom.

9 The standing order of the San Antonio Division of the
10 Western District of Texas on remote access to court
11 proceedings remains in effect. Photography, recording, or
12 streaming of this proceeding by any means is strictly
13 prohibited. Though this proceeding is open to the public,
14 technological restraints require that members of the general
15 public request access from the courtroom deputy to participate
16 remotely. Those granted approval to participate remotely must
17 not forward the electronic link to nonparticipating colleagues
18 or persons and must not post a link on any public forum.

19 As with all proceedings, violations of these
20 instructions are subject to contempt proceedings.
21 Accordingly, please exercise proper decorum at all times, and,
22 with that, we'll begin with the government's case.

23 Your witness.

24 MR. STERN: Thank you, Your Honor. The United States
25 calls Mr. William Ryan.

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1 (WILLIAM RYAN, having been duly sworn, testified as
2 follows:)

3 THE COURT: Is it warm in here?

4 THE DEPUTY CLERK: Yes, I went ahead and let Michael
5 know.

6 THE COURT: Thank you.

7 DIRECT EXAMINATION

8 BY MR. STERN:

9 Q. Mr. Ryan, good morning.

10 A. Good morning.

11 Q. Would you please introduce yourself to the Court.

12 A. My name is William Ryan. I'm an assistant chief counsel
13 for the Bureau of Alcohol, Tobacco, Firearms, and Explosives.
14 I'm stationed in Martinsburg, West Virginia.

15 Q. When we talk about alcohol, tobacco, firearms and
16 explosives, can I use the acronym "ATF"?

17 A. Yes.

18 Q. How long have you worked for ATF?

19 A. I've worked for approximately since 2009. I've been in
20 five positions since that time. Prior to that time, I was a
21 Marine Corps officer and judge advocate in Camp Pendleton,
22 California.

23 THE COURT: Mr. Ryan, can you move that mic closer to
24 you?

25 (Reporter clarification.)

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1 THE WITNESS: Camp Pendleton, California.

2 BY MR. STERN:

3 Q. And can you tell the Court some of the various roles that
4 you've held within the ATF?

5 A. Yes, sir. At ATF, I started as a staff attorney in 2009.

6 Through various reorganizations of the Office of Chief

7 Counsel, I was a senior attorney, and then finally assistant

8 chief counsel in the firearms and explosives law division.

9 I've been in that position for approximately three and a half
10 years.

11 Q. In those positions with the ATF, do you have any
12 familiarity with the Gun Control Act of 1968?

13 A. Yes, sir, I do. Gun Control Act of 1968 is one of the
14 four laws that the ATF is -- that the Attorney General has
15 allowed ATF to enforce through delegation orders.

16 Q. Is that the same with the Brady Act?

17 A. The Brady Act is part of the Gun Control Act, sir, yes.

18 Q. And then the NICS Improvement Amendments Act of 2007?

19 A. Also the Gun Control Act. Yes, sir.

20 Q. Thank you. And, again, can I use an acronym NIAA for NICS
21 Improvement Amendments Act?

22 A. Yes, sir. That is the accepted acronym.

23 Q. Thank you. And do you have familiarity with firearms and
24 modifications of firearms?

25 A. Yes. One of my roles at ATF in the Martinsburg facility

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1 is counsel to the Firearms and Ammunition Technology Division
2 or FATD. FATD houses the ATF's experts on firearm
3 classifications, technical modifications, things like that.
4 And so I have a regular -- regular role of advising them in
5 the legal aspects of their job.

6 Q. And you have already talked about your service with the
7 armed forces. Do you have experience with tactical weaponry
8 as a result of that experience?

9 A. I do. I did serve on one tour in Al-Fallujah, Iraq with
10 the infantry battalion. I was a legal adviser there.

11 Also, all Marine Corps officers are sent through what's
12 known as the basic school in Quantico, Virginia six-month
13 infantry training, so every Marine Corps officer is a rifle
14 platoon commander first. So I've experienced and had
15 experience with many weapon systems there.

16 And then as part of my training for ATF, I've also gone to
17 gunsmithing courses, including one for LWRCI, which is a
18 manufacturer in Maryland.

19 Q. Any other certifications or schooling relating to
20 firearms?

21 A. Just mostly on-the-job training and what's involved in my
22 daily work at ATF, sir.

23 Q. Okay. I'd like to talk to you a little bit about
24 Devin Kelley specifically and his being prohibited under the
25 Gun Control Act, if that's okay.

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1 A. Yes, sir.

2 Q. Did there come a time when the Department of Defense
3 Office of Inspector General's office contacted your office and
4 request an official determination and analysis from the ATF
5 regarding Devin Patrick Kelley?

6 A. There was. I was at a meeting with the Office of
7 Inspector General for DOD and met with an inspector there who
8 was also working on the Devin Kelley case. And we made
9 contact and I agreed that I would be -- and I was appointed to
10 be the ATF liaison to the DOD Office of Inspector General on
11 that case.

12 Q. And did you make determinations regarding whether Devin
13 Patrick Kelley was disqualified from legally owning or
14 possessing a firearm under the Gun Control Act?

15 A. Yes, sir. The Office of Inspector General provided us
16 documentation that they had accrued during their
17 investigation, and we determined that Mr. Kelley was a
18 prohibited person under 922(g)(1) and (g)(9) of the Gun
19 Control Act, the felon and the misdemeanor crime of domestic
20 violence prohibitors.

21 Q. I want to pull up Joint Exhibit 9, please.

22 Is this the memorandum your office sent to the Department
23 of Defense Office of Inspector General in response to their
24 request?

25 A. That is. Yes, sir.

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1 Q. If we look at the bottom there, is that your signature?

2 A. That is my signature, yes.

3 Q. Now, it says "Barry Barlow," [phonetic], but that is your
4 signature?

5 A. That is. I have -- as assistant chief counsel, I had
6 signature authority, so I was allowed to sign it, but
7 Mr. Barlow was the associate chief counsel who was in charge
8 of the section.

9 Q. No forgery. We're okay on that?

10 A. We're good, sir. Yes.

11 Q. Then again, your conclusion, was Devin Kelley prohibited
12 from owning or possessing a firearm under 18 U.S.C. 922(g) (1)?

13 A. That's correct, yes.

14 Q. And (g) (9)?

15 A. That's right.

16 Q. What about (g) (4)? Was Devin Kelley prohibited from
17 owning or possessing a firearm under 18 U.S.C. 922(g) (4)?

18 A. No, sir. Based on the documentation that we received from
19 the Office of Inspector General, we determined that Mr. Kelley
20 was either adjudicated a mental defective or committed to a
21 mental institution.

22 Q. That he was not either of those?

23 A. Right.

24 Q. And then with regards to 922(g) (6), regarding dishonorable
25 discharges, was Devin Kelley prohibited from owning or

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1 possessing a firearm under 18 U.S.C. 922(g) (6)?

2 A. No, sir, he was not. He had received a bad conduct
3 discharge as a characterization of service and the prohibitor
4 under the Gun Control Act, (g) (6), very specifically states
5 dishonorable discharge. A bad conduct discharge and a
6 dishonorable discharge are two very different
7 characterizations of service under the law.

8 Q. And I'll actually represent to you that the parties have
9 stipulated that your analysis, this is correct, insofar as
10 Devin Kelley was not prohibited under 922(g) (4) or (g) (6)?

11 A. Yes, sir.

12 Q. Now, is each prohibitor under the Gun Control Act
13 independent of one another?

14 A. Yes. Each of the prohibitors stands alone, and so when
15 ATF or FBI is determining whether someone is prohibited, each
16 of the individual prohibitors would be looked at in -- in --
17 by themselves to determine whether a person is prohibited.

18 Q. Can the submitting department or agency evaluate any other
19 conduct regarding an individual when deciding whether they are
20 prohibited under the Gun Control Act?

21 A. The submitting agency can submit information, whether --
22 whether that -- it results in a prohibition -- or that would
23 not result in a prohibition, I should say. Unless it meets
24 one of those specific statutory factors.

25 Q. So you said the agency may submit other information, but

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1 can that other information, in and of itself, create an
2 obligation to report under the Gun Control Act?

3 A. No, sir.

4 Q. What can the submitting department or agency consider when
5 determining whether an individual is prohibited under the Gun
6 Control Act?

7 A. Any information that would -- that would lead to a
8 conclusion that one of those prohibitors is met: a conviction
9 for a felony; a conviction for a misdemeanor crime of domestic
10 violence; or in this case, you know, if a discharge from the
11 military was a dishonorable discharge. A bad conduct
12 discharge is indicative of something, but it is not indicative
13 that a person is prohibited under the Gun Control Act from
14 owning a firearm.

15 Q. So, again, a bad conduct discharge in and of itself does
16 not create an obligation to submit under the Gun Control Act;
17 is that fair?

18 A. It would not make it prohibited. That's right, sir.

19 Q. Let's take a look at Joint Exhibit 20.

20 Are you familiar with this document?

21 A. I am. Yes, sir.

22 Q. What is it?

23 A. This is the results of trial from the Air Force
24 court-martial of Devin Kelley.

25 Q. And did Devin Kelley plead guilty to two specifications

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1 under Article 128(g) of the Uniform Code of Military Justice?

2 A. Yes. The document shows two guilty pleas, one for each
3 specification.

4 Q. Let's pull up Specification 1 and I'm going to have you
5 read the specifics of Specification 1.

6 A. Sure. "The nature of the offense is that Mr. Kelley did,
7 within the Continental United States, on diverse occasions
8 between on or about 24, June 2011, and on or about 27,
9 April 2012, unlawfully strike Tessa K. Kelley on her body with
10 his hands, unlawfully choked the said Tessa K. Kelley on the
11 neck with his hands, unlawfully pull the hair of said Tessa K.
12 Kelley with his hands, and unlawfully kick the said Tessa K.
13 Kelley on her body with his foot."

14 Q. Was this the specification that made Devin Kelley
15 prohibited under 18 U.S.C. 922(g)(9)?

16 A. Yes, sir.

17 Q. Why is it that this specification is under (g)(9) as
18 opposed to (g)(1)?

19 A. The -- the possible sentence, term of imprisonment that
20 Mr. Kelley could have received was limited to less than a
21 year, it would have been six months, and so it would not have
22 qualified as a (g)(1) confinement and greater than one year --
23 one year or greater.

24 Q. So is it fair to say that in order to be a (g)(1) felony,
25 the maximum allowable punishment would have to be over one

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1 year?

2 A. That's right.

3 Q. And then for this specification, the maximum allowable
4 punishment was under one year?

5 A. That's right.

6 Q. Take a look at Specification 2, please.

7 Could you read aloud?

8 A. "That Mr. Kelley did within the Continental United States,
9 on diverse occasions between on or about 27, April 2011, and
10 on or about 16, June 2011, commit an assault upon JML, a child
11 under the age of 16 years by striking him on the head and body
12 with a force likely to produce death or grievous bodily harm,
13 to wit: his hands."

14 Q. Was this a specification that made Devin Kelley prohibited
15 under 18 U.S.C. 922 (g) (1)?

16 A. Yes, it was.

17 Q. And why was this a felony rather than a misdemeanor of
18 domestic violence?

19 A. The possible sentence or term of confinement that
20 Mr. Kelley could have received for this was over one year. I
21 believe it was up to five years because of the age of the
22 child and the grievous bodily harm that was charged.

23 Q. Did either of these specifications include the use of a
24 firearm?

25 A. They did not.

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1 Q. In fact, if we look at the second page of the result of
2 trial, do we see several specifications where Devin Kelley is
3 alleged to have used a firearm, either loaded or unloaded?

4 A. Yes. Specifications include both using pointing a loaded
5 and unloaded firearm.

6 Q. What were the results of these specifications?

7 A. These specifications resulted in not guilty pleas and then
8 ultimately withdrawal and dismissal after the arraignment.

9 Q. Because these specifications were withdrawn, could they be
10 considered in determining whether Kelley was prohibited under
11 the Gun Control Act?

12 A. No. They would not have been relevant under the statutory
13 prohibitors.

14 Q. Could they have created an obligation by the Air Force to
15 submit information regarding those specifications?

16 A. Not as it pertains to the Gun Control Act, sir.

17 Q. Thank you.

18 Going back to the first page, are these two specifications
19 the only grounds upon which the Air Force had an obligation to
20 submit Kelley's disqualifying information?

21 A. Based on the information we've received there, sir, that's
22 correct, these were the two grounds.

23 Q. Did any conduct other than these two specifications create
24 an obligation by the Air Force to submit Devin Kelley's
25 information to NICS?

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1 A. No, sir. Not under the Gun Control Act.

2 Q. If Devin Kelley was not adjudicated a mental defect or
3 involuntarily committed, could his mental health issues create
4 an obligation by the Air Force to submit information to NICS?

5 MR. ALSAFFAR: Objection, Your Honor. This goes well
6 beyond his expertise. Now he's trying to get him to testify
7 on specific elements of causes of action that he's clearly not
8 demonstrated as an expert in. They have not actually
9 designated him in that area as well, Your Honor.

10 THE COURT: I don't think he's been designated as an
11 expert at all. That's overruled.

12 BY MR. STERN:

13 Q. Again, based on your memo and your understanding of 18
14 U.S.C. 922(g) (4), if Devin Kelley was not adjudicated a mental
15 defect or was not involuntarily committed, could his mental
16 health issues create an obligation by the Air Force to submit
17 anything regarding Devin Kelley?

18 A. Not as it pertains to prohibitors under the Gun Control
19 Act, sir.

20 Q. Now, we've heard some testimony about general threats
21 Devin Kelley made to kill leadership and other people. Could
22 such threats create an obligation by the Air Force to submit
23 Kelley's information into NICS?

24 A. The statutory prohibitors are clear, sir, and -- and so
25 the answer is no, because the statutory prohibitors are clear

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1 that only those categories of items are relevant. Those
2 categories of prohibitors are relevant in determining whether
3 somebody can lawfully possess a firearm.

4 Q. So could those threats even be considered when determining
5 whether someone was prohibited from owning or possessing a
6 firearm?

7 A. They would be irrelevant, sir.

8 Q. We've also heard about some really horrendous acts by
9 Devin Kelley that may have been known to the Air Force at the
10 time. Could those other bad acts be considered in determining
11 whether Kelley was prohibited under the Gun Control Act?

12 A. Yes, sir. The prohibitors are for things such as
13 convictions. None of those things were convictions. Those
14 bad acts would not have led to a prohibition on the possession
15 of firearms, the lawful possession of firearms.

16 Q. Those other bad acts wouldn't create a duty by the Air
17 Force, or an obligation by the Air Force to submit anything;
18 correct?

19 A. Not under the Gun Control Act, sir, no.

20 Q. And they couldn't be considered in terms of whether or not
21 Kelley was prohibited under the Gun Control Act?

22 A. That's right.

23 Q. Are you familiar with the facts of this case?

24 A. I am, sir, yes.

25 Q. Are you familiar with Kelley's interest in firearms?

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1 A. I am, yes, sir.

2 Q. Based on your knowledge and experience, was Devin Kelley
3 the type of person who would seek firearms through any means
4 possible?

5 MR. ALSAFFAR: Objection, Your Honor. That goes well
6 beyond his designation.

7 THE COURT: That does. That's sustained.

8 BY MR. STERN:

9 Q. Okay. So let's talk about the firearm that Devin Kelley
10 purchased at Academy in April 2016. Are you familiar with
11 that transaction?

12 A. I am, yes, sir.

13 Q. Let's first talk about the firearm as it was found by the
14 Texas Rangers following the shooting.

15 A. Okay, sir.

16 Q. Following the shooting, did the ATF conduct an examination
17 of Kelley's firearm as it was recovered by the Texas Rangers?

18 A. They did. Yes, sir.

19 Q. Can we take a look at Joint Exhibit 423.

20 Are you familiar with this document?

21 A. I am. Yes, sir.

22 Q. What is it?

23 A. This is the report of investigation from the San Antonio
24 Field Office, the field office from -- for ATF, and this first
25 portion is a summary of events of the -- of the --

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1 observations and the investigation of the scene.

2 Q. Turn to page 5. A little further down. Page 5 of this
3 memo. One up above that.

4 If you look at the portion of this memo that talks about
5 the Ruger 556, can you read the first three lines?

6 A. "The above rifle was manufactured by Ruger in Mayodan,
7 North Carolina as a semiautomatic firearm. Manual field
8 testing of the firearm indicated semiautomatic function. The
9 firearm was not test-fired by ATF personnel during the
10 inspection. Additionally, the rifle was found to incorporate
11 an aftermarket drop in trigger assembly."

12 Q. What is an aftermarket drop in trigger assembly?

13 A. Aftermarket drop in trigger assemblies are often highly
14 engineered quality triggers that differ from the factory
15 triggers in the smoothness of operation, things like that, and
16 so target shooters, hunters, people who often use aftermarket
17 drop in triggers to increase the quality, the smoothness of
18 functioning of the weapon when they're -- when they're firing
19 rounds.

20 Q. So is it fair to say this trigger did not come with the
21 rifle as it was purchased?

22 A. That's right. It does not appear to have come with the
23 rifle as a factory.

24 Q. If we look at the next page, it talks about several other
25 modifications; is that correct?

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1 A. Yes. Those are -- those are the other features of that
2 firearm, yes.

3 Q. Let's go -- was it features of the firearm, or is it
4 modifications to the firearm?

5 A. I don't know. Like, for example, the electronic red dot
6 sight, likely aftermarket. Whether or not Ruger had these in
7 the factory, these are -- these are generally aftermarket.
8 They may have been put on in the factory, but they are
9 typically what we see in the aftermarket realm.

10 Q. Let's take these one at a time here.

11 First, the Bushnell electronic red dot sight with
12 high-rise mount. What is that?

13 A. The red dot sight is a sight that differs from a
14 traditional rifle sight, whereas a traditional rifle sight one
15 would close -- the shooter would close his eye, look through
16 the circle and align the post to fire. The red dot sight
17 allows both eyes to remain open, increases target acquisition
18 and --

19 MR. ALSAFFAR: Objection. May I interpose an
20 objection?

21 If I could, Your Honor, this is outside the scope of
22 his designation. I would like to show you his designation --
23 fact witness designation. That's what it was. It's the
24 defendant's latest disclosures on that.

25 His designation was simply to talk about the Gun

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1 Control Act prohibitors, which he's done, so we can check that
2 off and the section under the U.S.C. -- 18 U.S.C. Code
3 relating to Academy sale.

4 That's it. He was not designated to talk about
5 firearms. He was not designated to talk about how they work
6 and how you modify them and how you put them on and how you
7 change them. This is well outside their designation.

8 And if we could show you --

9 Could you pop up --

10 THE COURT: Well, why isn't this relevant to whether
11 or not at the time they were purchased from Academy, they had
12 this stuff on there or not?

13 MR. ALSAFFAR: It's not relevant, Your Honor. The
14 only question on that is whether it should have been sold.

15 THE COURT: Your response?

16 MR. STERN: To Your Honor's point, it does go to the
17 extent to which these modifications were made after the sale,
18 so we will get to the actual sale itself. But to the extent
19 that Devin Kelley modified this firearm, it is directly
20 relevant to that purchase.

21 THE COURT: Well, so the problem with your question
22 is about who modified them or not. He doesn't know that. But
23 you can ask him questions about at the time of the sale at
24 Academy, does he believe these were part of the sale or
25 whether they were done after the fact.

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1 MR. STERN: Okay.

2 BY MR. STERN:

3 Q. Then let's take the Court's lead and ask just those
4 questions with regard to each of these.

5 Do you have an understanding as to whether the Bushnell
6 electronic red dot sight with high-rise mount was part of the
7 sale of the AR-556 in April of 2016?

8 A. My understanding is that that was an aftermarket addition
9 to the firearm.

10 MR. STERN: Your Honor, may I ask him what these
11 items are?

12 THE COURT: Yeah, that's fine.

13 MR. STERN: Thank you.

14 BY MR. STERN:

15 Q. I think we've already talked about the high-rise mount
16 sight. Let's talk about the Magpul forend having vertical
17 foregrip installed. Do you believe that that was part of the
18 rifle as purchased in April 2016?

19 A. I do believe that is an aftermarket addition as well.

20 Q. And what is that?

21 A. The foregrip is a place for the forward hand to grip the
22 firearm. Rather than with palm upward, gripping the plastic
23 piece around the barrel, this allows the shooter to grip the
24 firearm in a more natural way, so the palm outward. Just a
25 more ergonomic way of handling the firearm, especially over

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1 long time periods or through much shooting.

2 Q. Next, Magpul adjustable shoulder stock. Do you believe
3 that was part of the firearm as purchased in April 2016?

4 A. I don't -- I don't know if it was or not. The -- the
5 adjustable shoulder stocks are specifically sometimes
6 included. Whether the Magpul was, I just don't know if it
7 was.

8 Q. That's fair.

9 The Magpul battery assist device. Is it also known as
10 BAD?

11 A. That's the Magpul acronym for it, yes.

12 Q. What is a battery assist device?

13 A. A battery assist device is -- specifically as it's used by
14 Magpul, when one needs to release the bolt to load a round
15 after loading another magazine, one would normally have to
16 release the bolt by taking the finger off the trigger, or
17 otherwise moving the hands from the shooting position.

18 This allows a shooter to send a bolt home, load a new
19 round from the bolt, new magazine, without removing hands from
20 the trigger or other shooter positions -- shooting positions.

21 Q. And do you have an understanding as to whether or not this
22 was part of the rifle as purchased in April of 2016?

23 A. I do not believe that it was.

24 Q. Now, we've already talked about the aftermarket trigger
25 assembly, and you testified that you believed that that was

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1 not part of the rifle as purchased in April 2016?

2 A. That's correct, based on the FATD report. That's right.

3 Q. The enlarged charging handle latch. What is that?

4 A. The enlarged charging handle latch is a mechanism for
5 pulling back and releasing the bolt to charge the weapon the
6 first time to load the first round. Oftentimes, with gloves
7 or simply because of manual dexterity issues, it's a very
8 small factory handle. Sometimes larger handles are added to
9 make it easier to charge the weapon the first time.

10 Q. Do you have an understanding as to whether or not that
11 would have been part of the rifle at the time of purchase in
12 April 2016?

13 A. That I don't know. I don't know if that was part of the
14 Ruger package or not.

15 Q. And, finally, two-point sling assembly.

16 A. The two-point sling assembly is two loops on either --
17 metal loops, plastic loops, on either end of the firearm the
18 sling attached to, makes it possible to carry the firearm
19 either over the shoulder or cross-body.

20 Q. Let's talk about the modifications as you've identified
21 them post -- post-purchase.

22 Do those modifications -- were they designed for a
23 military and law enforcement purpose?

24 A. These, the Magpuls, the red dot sight, those are typically
25 used in a tactical setting. And that's, I believe, what they

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1 were designed for, based on my experience, rapid target
2 acquisition, rapid loading, things like that.

3 Q. Do they enhance the lethality of the firearm?

4 A. They arguably enhance the accuracy and the number of
5 rounds that we say can get down range in a matter of time, and
6 so certainly they increase fire rate and perhaps accuracy as
7 well.

8 Q. When we talk about accuracy and the number of bullets,
9 doesn't that equal lethality?

10 A. Arguably, yes.

11 Q. Does the fact that Devin Kelley made many modifications to
12 his firearms tell you anything about his level of gun
13 enthusiasm?

14 MR. ALSAFFAR: Objection, Your Honor. Speculation.

15 THE COURT: Sustained.

16 BY MR. STERN:

17 Q. Take a look at Joint Exhibit 502-128.

18 Is this a picture of Devin Kelley's firearm with the
19 various modifications?

20 A. I can't see the serial number but that does appear to be
21 the firearm, or one very similar to it. This one has the
22 addition of the Taclight, which is a tactical light, a
23 flashlight that was added on to the rail system on the front
24 of the firearm.

25 Q. Thank you. You can take that down.

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1 Now, let's talk about the actual purchase by Devin Kelley
2 at Academy Sports and Outdoors in April 2016; is that okay?

3 A. Yes, sir.

4 Q. Are you familiar with that transaction?

5 A. I am, yes, sir.

6 Q. Did -- and I'm going to use shorthand "Academy" for
7 Academy Sports and Outdoors; is that okay?

8 A. Yes, sir.

9 Q. Did Academy violate federal law by selling the AR-556 to
10 Devin Patrick Kelley?

11 MR. ALSAFFAR: Objection, Your Honor. We do have an
12 objection to this because now the government is -- the
13 objection, Your Honor, is that it's irrelevant because this is
14 testimony that goes directly to the province of the Court. He
15 is now going to come in and testify as a lawyer for the same
16 Department of Justice that the attorneys work for to tell you
17 what the law is and in apportioning responsibility in this
18 case.

19 Just as Colonel Youngner had to stay within his
20 contours and not comment on the ultimate issues of law before
21 the Court, they have now brought one of their very own
22 Department of Justice lawyers, just as if I'd brought
23 Mr. Jacob and put him on the stand to tell you about
24 proportionate responsibility to tell you what the law is and
25 how to apply that law to these facts in the case.

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1 That is beyond the scope of any witness, much less
2 one of the very attorneys hired by the Department of Justice.

3 THE COURT: So I'll let it in. That's overruled.

4 I'm allowing in facts that this witness can tell me
5 to place with Academy's purchase, and that it is continuing
6 the relevant -- there is relevance here for the proportionate
7 liability claim that the government's asserted against
8 Academy. So with that, yeah, I don't want to hear --

9 I don't want you to tell me what the law is, just
10 tell me what the facts were.

11 BY MR. STERN:

12 Q. As a matter of fact, April 7, 2016, when Academy sold the
13 AR-556 to Devin Kelley, was it violating federal law?

14 THE COURT: Well, let's backtrack. Tell me how it
15 violated. What took place at Academy? Give me facts. Don't
16 give me a conclusion.

17 THE WITNESS: Yes, sir. Yes, sir.

18 The facts of this case were that the Ruger model that
19 was sold, the -- I believe it was the 8500 -- included with
20 it, and in the package, in the wrapped package, a 30-round
21 magazine. That 30-round magazine is lawful to possess in
22 Texas. It is unlawful to possess in Colorado.

23 BY MR. STERN:

24 Q. If we pull up Joint Exhibit 345, page 4.

25 We're trying to deal with just the facts of the case --

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1 right? -- we will break it down piece by piece. If we look on
2 the first page, what address did Devin Kelley write down on
3 his ATF 4473 Form?

4 A. On the 4473, his current residence address is listed as
5 Colorado Springs, Colorado.

6 Q. If we look at the next page, what government-issued ID did
7 he use to make the purchase?

8 A. The Box 20A for identification says, "CODL," which
9 indicates a Colorado driver's license was used as government
10 identification.

11 Q. Is Academy required to rely on that address when
12 determining where Devin Kelley resided for purposes of
13 complying with federal law?

14 A. So under federal law, one of the requirements is that an
15 individual provide government identification with an address.
16 That's what was provided. That's the document that Mr. Kelley
17 provided, and that's the information he provided on his form.
18 And so the Colorado address, for Academy's purposes, would
19 have been the address they would have relied on.

20 Q. Now, when we take a look at page 6 of this transaction, we
21 see in the top portion that the manufacturer is Ruger;
22 correct?

23 A. That is correct.

24 Q. What is the model?

25 A. An AR-556.

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1 Q. Do you see the serial number?

2 A. Serial number's included as well in Box 28.

3 Q. And the type?

4 A. Type, generally is a rifle listed in 29.

5 Q. And the caliber or gauge?

6 A. The caliber is in Box 30 as 5.56 NATO.

7 Q. If we look a little bit further down, we see a signature
8 by an employee of the FFL; is that correct?

9 A. Yes, that appears to be the sales associate.

10 Q. What is the purpose of having someone on behalf of the FFL
11 sign this form?

12 A. One of the requirements is that the FFL must certify that
13 it's not unlawful to sell, deliver, transport, or dispose of
14 the firearm to the person listed on the 4473. This is that
15 certification.

16 Q. So is this, then, essentially saying that they are
17 complying with federal law?

18 A. That's right.

19 Q. If you look at page 12 -- look at the bottom portion
20 there. Do you know what this document is?

21 A. Yes. I understand. This document is an internal
22 document, a document to Academy that ensures or is meant to
23 ensure compliance with federal law in firearms transactions.

24 Q. If we look at the last portion, do you see where it says,
25 "SKU number"?

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1 A. Yes, sir.

2 Q. What is a SKU?

3 A. A SKU is a general term used for production or a general
4 concept used for inventory purposes. A SKU represents a
5 particular packaging or a particular item in an inventory, and
6 so the SKU in this case represented the AR-556 package that
7 was sold at the Academy sports store.

8 Q. We'll come back to this document, but for right now, I
9 want to go to Joint Exhibit 76. And let's remember that SKU.
10 I think if we highlight it one more time.

11 Can you read the SKU, please?

12 A. The SKU is 103530047.

13 Q. Thank you. We'll return to this document, but let's go to
14 Joint Exhibit 76. Are you familiar with this document?

15 A. I am. This is a printout of the Academy Sports and
16 Outdoor Web page advertisement for the Ruger AR-556.

17 Q. If we pull up the portion that reads "SKU."

18 I know it's pretty difficult to read, but can you see it?

19 A. I can. On that Web page, the advertisement includes the
20 SKU 103530047.

21 Q. Is that the same SKU that was on the transaction checklist
22 filled out by Academy when they sold the AR-556 to
23 Devin Kelley in April of 2016?

24 A. Yes, sir.

25 Q. So is it fair to surmise that this is the model and SKU of

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1 the AR-556 as it was sold to Devin Kelley?

2 A. Yes, sir.

3 Q. Can we look at page 2 of this document.

4 Can you read the paragraph that says, "details and specs"?

5 A. I can.

6 Q. Thank you.

7 A. "The Ruger AR-556, 5.56 semiautomatic rifle, is a
8 semiautomatic rifle with a 30-round capacity that features a
9 cooled hammerforged medium contour, 1 1/2 by 28 threaded
10 barrel with a matte, corrosion resistant Type III hardcoat
11 anodized finish, a six-position telescoping M4 style buttstock
12 with a Milspec buffer tube, and an ergonomic pistol grip with
13 heat resistant glass-filled nylon handguards, includes a
14 30-round Magpul PMAG magazine."

15 Q. By reading the details of the specs, do you know whether
16 the 30-round capacity magazine was sold in the box with the
17 AR-556?

18 A. Yes, sir. It came included with the rifle.

19 Q. And if the 30-round capacity magazine is sold in the box
20 with the rest of the AR-556, is it a component part of the
21 rifle?

22 A. Yes, sir.

23 MR. ALSAFFAR: Objection, Your Honor. He's now
24 testifying on what the definition of component part in the law
25 is. The answer should be stricken.

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1 THE COURT: That's overruled.

2 BY MR. STERN:

3 Q. Continue.

4 A. Yes, sir. It was included in the box. That was a
5 component that Ruger specifically sold as a component of that
6 firearm.

7 Q. Is the 30-round capacity magazine lawful to purchase in
8 Colorado at the time?

9 MR. ALSAFFAR: Objection, Your Honor. He's now
10 talking about the law and how it applies to the case.

11 THE COURT: Yeah. That's overruled.

12 THE WITNESS: The -- at the time that this firearm
13 purchase occurred, and currently, 30-round magazines are not
14 lawfully possessed in Colorado.

15 BY MR. STERN:

16 Q. When did Colorado ban large-capacity magazines?

17 A. Following the -- the theater shooting up in Colorado,
18 Aurora, the Colorado legislature passed a law banning
19 large-capacity magazines, I think after the date July 1st,
20 2013. So possession of large-capacity magazines, including
21 30-round magazines after that date was unlawful within that
22 state.

23 Q. And, again, Devin Kelley purchased the AR-556 with the
24 30-round magazine in the box; correct?

25 A. That's correct.

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1 Q. And as a result, would that have been a violation of
2 Colorado state law?

3 A. Yes, sir. That --

4 MR. ALSAFFAR: Objection, Your Honor.

5 Again -- and I apologize, but this is a clever way of
6 trying to sneak now this witness' opinion into what Texas law
7 is, and that's, I believe, the boundaries we've established
8 here.

9 THE COURT: He's already answered that. It wasn't a
10 violation of Texas law. It was a violation of Colorado law.
11 So your objection is noted, but overruled.

12 BY MR. STERN:

13 Q. Was it a violation of federal law? When Academy sold the
14 AR-556 with the 30-round magazine in the box, was it a
15 violation of 18 U.S.C. 922(b)(3)?

16 A. Yes, sir, it was.

17 Q. Why?

18 A. The Gun Control Act is meant to assist states in the
19 regulation within their borders of their firearms laws. One
20 of the problems that Congress recognized in 1968 was that
21 someone could merely go over state lines, buy a firearm, and
22 bring it back to another state.

23 As part of that, what Congress did in the Gun Control Act
24 was made it unlawful for federal firearms licensees to assist
25 in that circumvention. And so 922(b)(3) prohibits an FFL

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1 within one state from violating another state's laws when they
2 know that buyer resides in that other state.

3 Q. In other words, Colorado banned large-capacity magazines
4 after a mass shooting; correct?

5 A. That is correct.

6 Q. And Congress was concerned about prohibited individuals or
7 any individuals circumventing that law by going to other
8 states and purchasing the firearms; correct?

9 A. That's correct.

10 Q. And so as a result, Texas has to comport with the state
11 laws of Colorado?

12 A. When selling to Colorado residents, yes, sir.

13 Q. Again, we've already established that Academy had to rely
14 on Devin Kelley's Colorado driver's license when making the
15 sale?

16 A. That's correct.

17 Q. Take a look at Joint Exhibit 82.

18 Are you familiar with this document?

19 A. I am, yes, sir.

20 Q. What is it?

21 A. This is the ATF guidebook for Importation & Verification
22 of Firearms, Ammunition, and Implements of the War. This is a
23 document that ATF puts out and is available online.

24 Q. If we look at page 8, this talks about a self-loading
25 action or a semiautomatic, correct?

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1 A. That is correct. Yes, sir.

2 Q. And under this nomenclator guidebook, would the magazine
3 be a component part, just like any other component team here?

4 A. That is correct, sir. The magazine is a component, same
5 as a trigger or a bolt, and it lists a couple different -- or
6 three different types, generally, of magazines that may be
7 used in semiautomatic firearms.

8 Q. And if we take a look at Joint Exhibit 79. Flip that
9 over.

10 Does this comparison chart show the distinction between an
11 AR-556 and a state-compliant AR-556?

12 A. Yes, sir. That's what it looks to show.

13 Q. What would be the purpose of Ruger creating a
14 state-compliant AR-556?

15 A. The reason is because of those state laws we talked about
16 before, sir. Ruger is a national company. They sell in more
17 than one state, and so what they've done is, in order to
18 comply with federal law, they've created a firearm -- the
19 "state compliant" refers generally to a firearm that would be
20 compliant in those states that have lower magazine
21 capacities -- allowances, and so the state compliant would not
22 typically have a 30-round magazine, it would have, say, a
23 10-round magazine, in a state such as Colorado, New York,
24 California, Connecticut, states like that where this firearm
25 could be sold.

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1 Q. In fact, when we take a look at the row that talks about
2 magazines, we see the distinction that you are referring to;
3 correct?

4 A. That's correct. Yes, sir.

5 Q. And how many rounds does the standard AR-556 have?

6 A. The 556 in the first column has a 30-round Magpul
7 magazine.

8 Q. And the state compliant?

9 A. The state compliant, sir, has a 10-round metal magazine.

10 Q. So in order to comply with Colorado law, does Ruger sell
11 this even in Colorado?

12 A. The SKU for the AR-556 with the 30-round magazine would
13 not be lawful to sell to non-law enforcement or government
14 entities in Colorado, sir.

15 Q. Do they sell the state-compliant version of the AR-556?

16 A. I do believe that they do. Yes, sir.

17 Q. Is that -- to the extent that you know, is that in order
18 to be compliant with Colorado law?

19 A. That's right, sir. It would be unlawful to sell the rifle
20 with the 30-round magazine to citizens, just regular citizens,
21 in Colorado.

22 Q. Thank you.

23 And let's take a look at Government Exhibit 223.

24 Are you familiar with this document?

25 A. I am, yes, sir.

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1 Q. What is it?

2 A. This is an acknowledgment of federal firearms regulation.
3 This is a document that ATF utilizes in inspections and in
4 reviewing the laws with federal firearms licensees.

5 Q. So can you walk the Court through that process of how you
6 sort of explain to FFLs their compliance requirements?

7 A. Yes, sir.

8 One of the requirements, Your Honor, when an FFL
9 determines, or an individual company decides it's going to get
10 a federal firearms license, it has to go through numerous
11 inspections to make sure the facility is appropriate, there
12 is -- the zoning is correct, all sorts of things.

13 One of the requirements is that ATF sit down with whoever
14 that responsible party is and go through all of the laws that
15 apply to federal firearms licensees, specifically when they
16 make sales or when they are engaged in the business.

17 This document is meant to guide that discussion and ensure
18 that all of the aspects of legal compliance are covered in
19 both the initial inspection when the license is issued, as
20 well as the annual inspections as they occur.

21 BY MR. STERN:

22 Q. If we look down at the bottom of this document, page 2, we
23 see the signature. Is that a signature from the -- an
24 employee of the FFL?

25 A. That's what it would be. Yes, sir.

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1 Q. And what -- what would the first name -- the first name,
2 would that be from the ATF inspector?

3 A. The investigator's name is Mark Sadler who conducted this
4 review with the FFL or the responsible party of the FFL. His
5 name is typed, and I believe his ATF investigator signature, I
6 believe that's also his signature on the second line.

7 Q. So both the FFL and the ATF inspector have signed this
8 document?

9 A. That's correct.

10 Q. This is the way -- is this -- what's the purpose of having
11 the FFL sign this document?

12 A. To ensure that that was the individual who was there, that
13 that individual is a responsible party who -- who would be
14 someone with authority in these areas, and just to make sure
15 that, you know, that this meeting actually occurred.

16 Q. And if we look at the date, November 24th, 2015?

17 A. That's correct.

18 Q. That would be approximately six months before the sale?

19 A. Sometime before the sale, yes, sir.

20 Q. Thank you.

21 Let's go back to --

22 THE COURT: Before we get off that, I'm just curious,
23 so is this for Academy nationwide, or is this -- or does each
24 Academy store and independent FFL that has to go through this
25 process?

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1 THE WITNESS: Oh, yes, sir.

2 The actual business address. So if Academy has 100
3 sites, they would have to have 100 licenses at the different
4 addresses, and each of those would require a responsible
5 person. And so this would be at each of the addresses, not
6 corporate overall.

7 THE COURT: So no one has shown this to me, but I'm
8 assuming this is for the location which the gun was sold?

9 MR. STERN: That's correct.

10 BY MR. STERN:

11 Q. Did you have an understanding as to whether or not this
12 was from the address where the firearm was sold?

13 A. Yes, sir. Mr. Sadler is an inspector in the San Antonio
14 office.

15 Q. Thank you.

16 Let's go back to Joint Exhibit 67. Again, I believe you
17 informed the Court what this document is, but can you please
18 state again briefly, what is the purpose of this firearm
19 checklist?

20 A. This is a compliance document that the company made
21 through legal counsel or through their compliance people, I
22 would imagine, to make sure that the individual sales
23 associate goes through and hits all of these requirements to
24 make sure that every sale complies with the law.

25 Q. I believe that there's about six steps on this checklist?

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1 A. That's correct.

2 Q. Can you walk the Court through these various steps?

3 A. Sure. In each of these steps, Step 1 starts with follow
4 all safety instructions for handling firearms. Obviously,
5 don't point the weapon at anyone. Make sure it's unloaded
6 before you hand it to customer, things like that. And then in
7 concluding there, you'll see in line one, that the customer
8 has been instructed to follow all of these safety
9 instructions.

10 Step 2, verify the customer meets age and residency
11 requirements for a firearms transfer. This includes the --
12 you know, the age of 18 for a long gun; 21 for other firearms,
13 and then that -- there is a government-issued photo
14 identification as is required by the statute.

15 Step 3, is that they provide that identification.

16 Step 4, is to complete the 4473, which is the ATF Firearms
17 Transaction Record. This is the document in which the
18 prohibited person questions are asked and the background check
19 information is completed or -- or noted.

20 And then, finally, Step 5, pass the NICS or point of
21 contact background check, so that the firearm can finally be
22 transferred.

23 Q. Is there a Step 6 in the last portion of this?

24 A. I'm sorry. Yes.

25 Step 6, and then review the paperwork and firearm, and

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1 complete the firearm transfer, actually turning over that
2 firearm to the customer.

3 Q. So when should have Academy stopped this transaction?

4 A. Based on this form, one of the questions is, does the
5 customer meet the minimum age and residency requirements for a
6 handgun, pistol grip firearm, or receiver transfer.

7 That question, when I look at this form, is a bit odd that
8 it's not applicable, because the question is, "Does the
9 customer meet requirements and residency" -- I'm sorry -- "the
10 minimum age and residency requirements." It's applicable.
11 And, unfortunately, the answer is no, they didn't.

12 Now, the question may be, well, this wasn't that kind of
13 firearm.

14 Q. Um-hum.

15 A. But that -- that answer, "not applicable," at that point
16 is simply inaccurate. No, the customer would not have met the
17 requirements for those firearms.

18 Q. So you are saying this checklist is not complete or
19 comprehensive enough?

20 A. It's filled out -- it is filled out in a strange way such
21 that it asks a question that probably maybe isn't the question
22 they wanted to ask, but the way that question is termed,
23 "Does the customer meet the residency requirements for these
24 things," the answer is, no, he doesn't. It's not that it's
25 not applicable. It's that he doesn't meet those requirements.

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1 Q. So let's step back from this document, then. In the
2 normal transaction, if a Colorado resident, or someone showing
3 a Colorado ID, goes to a Texas FFL, tries to purchase this
4 AR-556 with the 30-round magazine in the box, when should the
5 FFL stop that transaction?

6 A. The FFL, knowing that the individual is a Colorado
7 resident, has information at that point. That information
8 includes that this person is not from a state where this —
9 this box could be sold, this magazine with this firearm could
10 be sold. At that point, one would hope the red flags would go
11 up, and the Academy sales associate, or manager, or somebody
12 would have recognized that there may be an issue here.

13 Q. In that circumstance when the FFL recognizes that there is
14 an issue, would they even initiate a NICS background check?

15 A. If there's a concern about violating the law such that
16 this can't — this transaction can't go through because it
17 would violate the law, there is no need to perform a
18 background check at that point, because there's no point.
19 Even if the person is — comes back as not prohibited, the
20 firearm transaction can't go forward.

21 Q. So is it fair to say that this sale should have stopped
22 before Step 4 on this checklist?

23 A. Arguably that's when the — that is when the store, the
24 FFL was on notice that something was — that there may be a
25 problem with this. That Colorado documentation that

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1 Mr. Kelley provided should have been that point. Even if the
2 4473 was completed or being done at the same time, that's at
3 the point that one would hope Academy, the sales associate
4 would have recognized an issue.

5 Q. Let me ask you this way: You don't need to run a NICS
6 background check in order to realize, or at least -- or at
7 least for an FFL that they should have realized that they were
8 not complying with federal law; correct?

9 A. That's right. That's why that information is on the top
10 of the 4473 before the background check information, to cut
11 out those issues before the background check is completed.

12 Q. So if Academy complied with federal law, would it have
13 conducted a NICS background check?

14 MR. ALSAFFAR: Objection. That calls for complete
15 speculation. They have not established a foundation at all
16 that he has any factual knowledge or understanding of the
17 process and the order in which anyone at this Academy store
18 went through. He's guessing at this point.

19 THE COURT: Say your question again.

20 MR. STERN: If Academy complied with federal law,
21 would it have conducted a NICS background check?

22 THE COURT: You can answer. That's overruled.

23 THE WITNESS: There would not have been a need to
24 conduct a background check, sir.

25

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1 BY MR. STERN:

2 Q. They would have all the requisite information to make the
3 determination that the sale was not compliant with federal
4 law?

5 A. Regardless of whether that individual was specifically
6 prohibited, the transfer could not have gone forward.

7 Q. Are FFLs presumed to know and comply with federal law?

8 A. Yes, sir.

9 Q. The acknowledgment form that we already looked at verified
10 that FFLs are presumed to know and comply with federal law?

11 A. And then -- yes, sir. And then go over specifics that are
12 included.

13 Q. Why is it important for FFLs to comply with the laws of
14 both where the state -- where the sale occurs and where the
15 buyer resides?

16 A. Again, sir, the point of the Gun Control Act, and one of
17 Congress' concern, was helping states enforce their law and
18 allowing the unfettered interstate transfer or transport of
19 these items in violation of that would undermine that purpose.
20 And so the requirements that FFLs abide with other state's
21 laws is one of the bases of the Gun Control Act.

22 Q. Following the events of November 5th, 2017, did anyone
23 from ATF tell Academy that its sale to Devin Kelley in April
24 2016 was legal?

25 A. Not based on these facts. No, sir.

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1 Q. Did anyone from ATF tell Academy that the sale was, quote,
2 unquote "a good sale"?

3 A. Not based on the facts that we have here, sir, no.

4 Q. Are you aware that there was testimony from Academy's
5 compliance officer, testifying that after the shooting,
6 Academy received confirmation from ATF Assistant Director Andy
7 Graham, and that he told Academy the sale was, quote,
8 "completely legal"?

9 A. I understand that testimony exists, yes, sir.

10 Q. Can you confirm whether anyone, including Assistant
11 Director Graham told Academy that the sale was completely
12 legal?

13 A. Based on these facts, sir, of what it was that was sold,
14 not just a quote, unquote "long gun" --

15 MR. ALSAFFAR: Objection, Your Honor.

16 Two objections. First, speculation. Second, this
17 goes well beyond his designation. He is now guessing over
18 what an assistant director may or may not have told at the
19 ATF -- or may not have -- told or communicated to the Academy
20 store. The question was: What do you think he would have
21 done in this situation?

22 THE COURT: That's not the question yet. So that's
23 overruled.

24 Let's take this one question at a time. Supposedly,
25 this gentleman said that this sale was legal. From your

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1 personal knowledge, is the question is that correct or not?

2 MR. STERN: Well, I can ask him if he has spoken --
3 if he has spoken to ATF Assistant Andy Graham.

4 MR. ALSAFFAR: That's hearsay.

5 THE COURT: Well, that's hearsay, so ask him
6 something that's going to avoid a hearsay problem.

7 BY MR. STERN:

8 Q. Are you aware of any communications by ATF to Academy
9 telling Academy that that sale was legal?

10 A. Not based on the facts, and what was in the box, sir.

11 THE COURT: Well, but you know that now. But, I
12 mean, the question is: Do you know something that
13 contradicts -- other than your testimony today, are you aware
14 of something else that contradicts this gentleman's testimony?

15 THE WITNESS: Well, sir. Yes, sir.

16 The question that -- that concerned me is what was
17 said on the phone. And if the question was, we sold a long
18 gun to a resident of Colorado, that's a very different
19 question than, we sold a long gun that Ruger sells with a
20 30-round magazine to a resident of Colorado.

21 And so I guess my problem is no one at ATF has
22 advised that the sale of a Ruger 556 with a 30-round magazine
23 under that SKU is permissible or lawful. Whether someone said
24 sale of a long gun to a Colorado resident is lawful is an
25 entirely different question.

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1 THE COURT: Well, just for my sake, is there
2 testimony from this gentleman that he said this?

3 MR. STERN: There is no testimony, Your Honor.

4 MR. ALSAFFAR: That's right.

5 THE COURT: Okay. Go ahead.

6 MR. STERN: Pass the witness.

7 THE COURT: Any questions?

8 MR. ALSAFFAR: Yes, Your Honor. Thank you.

9 CROSS-EXAMINATION

10 BY MR. ALSAFFAR:

11 Q. I had to check my watch to make sure it was still morning.

12 Good morning, sir.

13 A. Good morning, sir.

14 Q. You and I have never met before; right?

15 A. I don't believe so.

16 Q. My name is Mr. Alsaffar. I represent the Sutherland
17 Springs victims of this mass shooting. I have a few questions
18 for you, if that's okay?

19 A. Yes, sir.

20 Q. Can you hear me okay?

21 A. I can. Yes, sir. Thank you.

22 Q. Let me -- let me ask you just to start off with about what
23 you were asked about in regards to the prohibitors early on in
24 Mr. Stern's examination. The bottom line is that -- that
25 Devin Kelley should never have been able to be -- have a gun,

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1 like the one he used in this shooting; right?

2 A. He was a prohibited person at the time he bought it. Yes,
3 sir.

4 Q. And that means that an FFL can't sell it to him if it's
5 reported to the FBI, those convictions were reported to the
6 FBI?

7 A. It means that the background check would catch it, so the
8 FFL would not be able to sell it. Yes, sir.

9 Q. The thing that Mr. Stern, I don't think, asked you about
10 very quickly is that you went over the conviction and the
11 report of result of trial; do you remember that?

12 A. Yes, sir.

13 Q. And those were -- those would have resulted in automatic
14 denials from the FBI background check; right?

15 MR. STERN: Objection. Calls for speculation.

16 THE COURT: That's overruled.

17 THE WITNESS: It would have resulted in an automatic
18 denial. The term "automatic denial" is throwing me, sir.

19 Could you clarify?

20 BY MR. ALSAFFAR:

21 Q. Are you familiar -- you've talked a lot about the
22 background check system, and whether or not -- and the timing
23 of it and how it goes along. Are you familiar with how it
24 interacts with these prohibitors that you testified about?

25 A. Yes, sir.

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1 Q. What I'm saying is that when you beat a child --

2 THE COURT: Mr. Alsaffar, slow down.

3 MR. ALSAFFAR: Oh. Thank you.

4 I'm sorry, Gigi. I apologize.

5 BY MR. ALSAFFAR:

6 Q. When you are convicted of beating a child almost to
7 death -- which is what Devin Kelley was convicted of by the
8 Air Force; correct?

9 A. Yes, sir.

10 Q. And the way in which that was communicated on the report
11 of result of trial, it was clear that that was a prohibitor
12 that should result in an automatic denial if it's reported to
13 the FBI?

14 A. That's right, sir. It would be a felony conviction. And
15 that, the FBI would deny on. Yes, sir.

16 Q. And I'm sorry if I wasn't clear. What I meant by
17 automatic was just fast, quick to know.

18 MR. STERN: Objection. Calls for speculation.

19 MR. ALSAFFAR: I'm asking him, Your Honor.

20 THE COURT: That's overruled.

21 THE WITNESS: Based on the results of trial, that
22 would be a clear felony conviction, sir. Yes, sir, for the
23 child.

24 BY MR. ALSAFFAR:

25 Q. Thank you. I appreciate that.

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1 You also -- I didn't know this until today, you said that
2 the actual DODIG Inspector General, I believe Mr. Fine, who
3 conducted the investigation into the Devin Kelley shooting,
4 that you were asked by that office to provide them with legal
5 opinions?

6 A. No, sir. It wasn't Mr. Fine. One of the investigators,
7 Laura Hummage [phonetic] was her name. She was working on
8 that case. I met with her and she asked if -- if ATF could
9 assist Mr. Siminton [phonetic], who was the recipient of that
10 letter, is the one who corresponded with us.

11 Q. And all I meant was -- and I apologize, because that's
12 exactly what I said. What I really meant was the Office of
13 the IG that did the ultimate report, that office asked you to
14 provide them with legal opinions; correct?

15 A. As the agency authorized to enforce the Gun Control Act,
16 and delegated, they wanted the Attorney General and the ATF to
17 opine, sir. Yes.

18 Q. You did that?

19 A. Yes, sir.

20 Q. And you've seen the report?

21 A. The report, sir?

22 Q. I apologize. You -- any time I ask you a question and you
23 don't know what I'm asking, please, please tell me.

24 A. Yes, sir.

25 Q. That's always my fault, not your fault.

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1 A. Yes, sir.

2 Q. When I say "report," I mean the DOD Inspector General
3 final report on the Devin Kelley shooting.

4 A. I did review that, sir, some time ago, yes.

5 Q. I would imagine you would have -- you would have reviewed
6 it to ensure that whatever opinions you gave about this
7 transaction were actually accurately represented in the
8 report; is that fair?

9 A. I think so, sir. I think that I was more concerned with
10 the Air Force opinion and -- but, yes, sir, I get your point.
11 Yes, I wanted to make sure that they didn't disagree, or that
12 my opinions were not in error in some way, yes.

13 Q. Or that they misrepresented your opinions regarding this
14 transaction?

15 A. Fair enough.

16 Q. And nowhere in the inspector general report, do we find
17 any kind of conclusions, like the ones you just gave,
18 regarding Academy; is that fair to say?

19 MR. STERN: Objection. Relevance, whether the DODIG
20 report talked about Academy in its reporting.

21 THE COURT: That's overruled.

22 BY MR. ALSAFFAR:

23 Q. Let me re-ask the question.

24 A. Please.

25 Q. Nowhere in the DODIG report or the -- that you've seen,

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1 does -- did the DODIG make any kind of conclusions or
2 commentary about Academy's role in this -- in this shooting;
3 correct?

4 A. I think that's right, sir. As I recall, they were
5 concerned with internal processes of reporting. I don't think
6 they were concerned with how he got the weapon afterwards.
7 That was what DOJ was more concerned with, not DOD.

8 Q. And I appreciate that. So what I said was correct?

9 A. I don't think they talked about Academy. That's right,
10 sir.

11 Q. Now, let me transition to something that you and Mr. Stern
12 talked about and I'd like to actually relate it to the --
13 relate it to the sale transactions at Academy, and I'd like to
14 show you some documents that the government decided not to
15 show you that relate to that transaction, if you don't mind.

16 A. Okay, sir.

17 Q. Is that okay?

18 A. Yes, sir.

19 THE COURT: Let's avoid those kind of snide remarks.

20 MR. ALSAFFAR: Thank you, Your Honor.

21 BY MR. ALSAFFAR:

22 Q. Devin Kelley was convicted of a felony in a crime of
23 domestic violence; right?

24 A. Yes, sir.

25 Q. Both of which required the Air Force to submit his

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1 fingerprints and conviction to the NICS background system?

2 A. That's correct.

3 Q. Which means he would be, like we said, he would be
4 prohibited from purchasing weapons at Academy or any other FFL
5 for that matter?

6 A. That's right.

7 Q. Did you know that Devin Kelley obtained a Texas driver's
8 license before the shooting occurred?

9 A. I don't believe I knew that, sir, or if I knew it, I
10 didn't recall that.

11 Q. Did anybody from the government Department of Justice
12 office provide you with any evidence that Devin Kelley had
13 obtained a Texas driver's license well before this shooting
14 had occurred?

15 A. I don't recall a Texas driver's license, sir. I just
16 recall the 4473 with the Colorado. So to answer your
17 question, sir, I don't remember hearing about a Texas driver's
18 license.

19 Q. That's okay. Is it okay if I show it to you?

20 A. Yes, sir.

21 Q. Okay. I'd like to show Mr. Ryan Joint Exhibit 380, if we
22 could.

23 Mr. Ryan, just so you are oriented a little bit, it should
24 pop up on your screen.

25 Do you have something that's showing up on your screen

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1 that says JEX 380?

2 A. I do, sir, yes.

3 Q. Okay. And what I'd like to do is just highlight for you
4 the part that talks about Devin Kelley's driver's license
5 number, if we could highlight that paragraph, "driver's
6 license" and "commercial," and it will -- it will magnify for
7 you. Do you see that?

8 A. Yes, sir.

9 Q. So this shows that Devin Kelley, prior to the shooting,
10 you see that May 2017, had obtained a Texas driver's license,
11 license number 25628192; correct?

12 A. Yes, sir.

13 Q. All right. Did the government attorneys also let you know
14 that not only did Devin Kelley obtain a Texas driver's
15 license, but that he also used that Texas driver's license at
16 an Academy in Texas to purchase a firearm?

17 A. Yes, sir. I was aware that -- that there was some debate
18 at the Academy store about whether Mr. Kelley was actually
19 Colorado or Texas, but that he put Colorado on the 4473, sir.
20 So I was aware that there was a question about that at the
21 location.

22 Q. You are in the ATF; correct?

23 A. That's right. Yes, sir.

24 Q. Where is the ATF building in Washington, D.C.?

25 A. It is at 99 New York Avenue, north of the Capitol

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1 building.

2 Q. That's right across the street from Mr. Stern's office;
3 isn't it?

4 A. That could be. I don't know.

5 Q. The ATF actually does what's called "trace summary
6 sheets;" correct?

7 A. That's right.

8 Q. And what that means is that whenever a gun is purchased at
9 an FFL, like you've been talking about, the ATF does a trace
10 summary, tells you where it was purchased, tells you what time
11 it was purchased, tells you the license that was used to
12 purchase that firearm; correct?

13 A. I think it's when a firearm is traced, yes, sir, it
14 creates that summary.

15 Q. Fair enough.

16 And this firearm from Devin Kelley was traced, all of his
17 firearms were traced by the ATF?

18 A. Yes, sir.

19 Q. And can I show you -- I want to show you that trace
20 summary. It's --

21 Your Honor, it's Joint Exhibit 554.

22 And before I --

23 Does this look familiar, the standard ATF Trace Summary
24 Report?

25 A. It does, sir. That's the general format, yes.

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1 Q. And what I'm going to do is just highlight a couple of
2 parts for you so you can see them clearly. If we could go
3 there, Sean, thank you very much. That middle part. I'm just
4 going to make it easier for you to see.

5 Can you see that?

6 A. I can. Yes, sir.

7 Q. Okay. Now, this trace summary report shows that
8 Devin Kelley used his Texas driver's license. Do you see that
9 driver's license number at the bottom there that's
10 highlighted?

11 A. I do. Yes, sir.

12 Q. And if you will recall, that's the same driver's license
13 that matches up with the abstract that I showed you from the
14 Texas DPS; correct?

15 A. I believe it is, sir, yes.

16 Q. And if you look just a little bit up there, it's not
17 highlighted, right above Devin Kelley -- I'm sorry --
18 Devin Kelley's name, it says, "purchase date, 10/18/2017"; do
19 you see that?

20 A. Yes, sir.

21 Q. That is less than a month before this shooting; isn't it?

22 A. Yes, sir.

23 Q. All right. And then you see the address where this weapon
24 was sold to Devin Kelley using a Texas driver's license at an
25 Academy store in Selma; is that right?

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1 A. That is correct.

2 Q. So if Devin Kelley was denied the first time at the
3 Academy due to a Colorado license, let's just say that
4 happened, okay, he could have come back with his Texas license
5 and purchased a gun?

6 MR. STERN: Objection. Calls for speculation.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. If Devin Kelley, as you said, should have been denied
10 purchasing an AR-15 with his Colorado license, he could have
11 just come back with his Texas license and bought it; correct?

12 A. If he had a Texas license, sir, he could have used that
13 showing he was a resident of Texas and that problem would not
14 have occurred for him.

15 Q. That's right. In fact, that's exactly what happened in
16 this case. He bought a gun before the shooting at an Academy
17 with a Texas driver's license; correct?

18 A. The Ruger SR22, yes, sir.

19 Q. He didn't have the AR-15 on October 18, 2017. He could
20 have showed his license with the Texas driver's license,
21 bought the AR-15, and there would have been no problems with
22 that sale, you would have no criticisms of Academy then; would
23 you?

24 A. That's right, sir. And the reason is because the Texas
25 driver's license would show him to be a Texas resident, not a

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1 Colorado resident, so (b) (3) wouldn't be the issue.

2 Q. Okay. So what I said was correct?

3 A. Just further explaining, yes, sir.

4 Q. That's okay. I don't mind.

5 Now, regardless of whether he had a Texas driver's
6 license, if the Air Force had done its job, all those sales at
7 the FFLs following his conviction would have been denied;
8 correct?

9 A. Regardless of the license, sir, if he was a prohibited
10 person and the NICS check was conducted, that would have
11 stopped the sale.

12 Q. And he was a prohibited person; correct?

13 A. That's right.

14 Q. And you've seen it, that Academy ran the NICS background
15 check on those purchases?

16 A. They do have a NICS number on the 4473, yes.

17 Q. What did they say on them?

18 A. They proceeded, sir.

19 Q. Including the AR-15; correct?

20 A. That's right.

21 Q. If the federal government would have done its job and
22 reported his convictions, all those guns would not have been
23 sold to Devin Kelley at Academy; correct?

24 A. If the Air Force had reported the record of trial, the FBI
25 would have denied the transaction, yes, sir.

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1 Q. And it doesn't matter what language a salesperson used.
2 It doesn't matter what order a salesperson at Academy decided
3 to do their application process. Had that happened, the
4 Air Force had done its job, those guns wouldn't have been sold
5 to him?

6 THE COURT: One second.

7 MR. STERN: Objection. Speculation.

8 THE COURT: That's overruled.

9 THE WITNESS: The background check would have denied
10 the transactions.

11 BY MR. ALSAFFAR:

12 Q. And the Air Force, Mr. Ryan, you would agree with me, is
13 the only party 100 percent responsible for reporting
14 Devin Kelley's fingerprints and conviction information to the
15 FBI; is that fair?

16 A. Because it was an Air Force court-martial, sir, I would
17 agree with you.

18 Q. Are you saying that the Academy sale caused the shooting
19 in this case?

20 MR. STERN: Objection. Argumentative. Calls for a
21 legal conclusion.

22 THE COURT: This is strange. I'm not sure which part
23 of the government is speaking here. This is the ATF. That's
24 the Department of Air Force's position. I'm not sure whether
25 that's the ATF's position.

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1 MR. ALSAFFAR: I'm not sure either, Your Honor.

2 THE COURT: So make it clear which part of the
3 government you think you are asking this question to.

4 MR. ALSAFFAR: I'll try to clear it up, Your Honor.

5 MR. STERN: Your Honor, it still calls for a legal
6 conclusion.

7 THE COURT: That's overruled.

8 BY MR. ALSAFFAR:

9 Q. All I'm asking you is: Do you -- is it your stance, on
10 behalf of the ATF, that had Academy not sold this AR-15 to
11 Devin Kelley, this shooting wouldn't have happened?

12 A. I don't think that anybody at ATF or the government can
13 say that that single factor, that an FFL selling a firearm or
14 not selling a firearm caused or did not cause the shooting to
15 happen, sir. I just cannot say that.

16 Q. That's okay. So you have no opinion on that, then?

17 A. No opinion on it is different than "I can't agree with
18 your conclusion." So I think that as much as a single factor
19 can cause anything, I understand your point, but the fact that
20 Academy didn't sell the firearm, doesn't mean he couldn't have
21 gotten it elsewhere, doesn't mean he couldn't have bought it
22 from a private sale. Whatever the situation is, I just can't
23 speculate on the fact, whether that one transaction was the
24 cause. I just can't do that.

25 Q. That's fair. Then we won't ask you any more about that.

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1 All right. Let me ask you something that Mr. Stern
2 brought up that I'd like to talk to you about, and that was --
3 do you remember the discussion he had with you about -- about
4 whether -- whether ATF had communicated to Academy at all that
5 this sale was -- I think the term used was good sale or legal
6 sale. Do you remember that conversation?

7 A. Yes, sir.

8 Q. And I think what you were talking about is, "Hey" -- you
9 were being asked is, "Well, did the ATF tell Academy, no, this
10 is a good sale?" Is that what you were referring to?

11 A. After the fact, was it a good sale. That's right, sir.

12 Q. And I think you said, no, they didn't -- they didn't ever
13 bless this as a good sale or a legal sale; correct?

14 Is that right?

15 A. I think my testimony, and still is, that they never
16 blessed it as a good sale based on the facts here.

17 Q. Okay.

18 A. So given all the facts, no one at ATF said, "Yes, that
19 sale was a good sale," as that term is used.

20 Q. I have a similar but different question for you.

21 A. Okay.

22 Q. Because it's been over three years since this horrific
23 shooting. My question to you is: As senior legal counsel for
24 the ATF, has anyone from the ATF communicated to Academy that
25 this sale was illegal that you are aware of?

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1 A. I just don't know. I have not.

2 Q. Okay. It's a pretty big deal what you are saying Academy
3 did; right? It's a pretty big deal what they did?

4 MR. STERN: Objection. Argumentative.

5 THE COURT: That's sustained.

6 BY MR. ALSAFFAR:

7 Q. Let me rephrase it for you. The laws that you are talking
8 about that you say Academy broke are important laws; right?

9 A. Yes, sir.

10 Q. Those laws about selling guns are designed to keep every
11 single one of us safe; correct?

12 A. Yes, sir.

13 Q. Safe — they are designed to keep all of us safe from gun
14 violence; aren't they?

15 A. Yes. Yes, sir.

16 Q. And when a gun seller breaks the law, do you think they
17 ought to be held accountable for breaking the law?

18 A. Yes, sir.

19 Q. What have you done, then, to hold Academy accountable for
20 allegedly breaking the law?

21 MR. STERN: Objection. This is beyond the scope of
22 direct examination.

23 MR. ALSAFFAR: It goes to credibility, Your Honor.

24 THE COURT: Well, I'm questioning relevance. What is
25 the relevance of this question?

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1 MR. ALSAFFAR: Your Honor, the United States has
2 brought in a DOJ lawyer to say that the -- this Academy sale
3 was wrong, and that the ATF specifically never told Academy
4 that it was a good legal sale. And I think if this is -- if
5 that's what their position is, then we ought to know, for
6 credibility reasons, if they have done one thing to tell
7 Academy or enforce the law against Academy for this alleged
8 breaking of the law.

9 THE COURT: So my job, though, is to determine what
10 liability, if any, and what proportionate liability ought to
11 be assigned to either the United States Air Force or to
12 Academy. And so whatever deficiencies the ATF might have done
13 in not chastising or reprimanding or disciplining the FFL is
14 not relevant to what I have to do. That's sustained.

15 Well, my objection is sustained.

16 MR. ALSAFFAR: Well, I understood what your objection
17 was. Thank you, Your Honor.

18 BY MR. ALSAFFAR:

19 Q. All right. Well, let me ask you something about the
20 document that Mr. Stern showed you in your direct examination.
21 I believe it was JEX 423, and we'll look at the first page,
22 page 1. This document, JEX 423, I think is an ATF document;
23 correct?

24 A. That is correct, yes, sir.

25 Q. Summary of what happened at the scene of the shooting;

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1 right?

2 A. That's right.

3 Q. And this was actually done by ATF agents on the scene; is
4 that right?

5 A. That is correct, yes, sir.

6 Q. All right. And what -- if we can look at paragraph --
7 sorry -- paragraph 5. What that's telling us and telling the
8 Court is that every single gun that was found at the scene of
9 this crime was an FFL-purchased gun; correct?

10 A. It looks that way, sir. Academy, Academy and Specialty
11 Sports and Supply, I would assume, is an FFL.

12 Q. Right. If it was any kind of an illegal purchase,
13 certainly the ATF would have noted that on the report of
14 investigation; correct?

15 A. If it was an illegal purchase, I would assume so, yes,
16 sir.

17 Q. Okay. And if we go to paragraph numbers 9 and 10, I'll
18 ask you about that, and one of the things that ATF special
19 agents do when they arrive at a scene like this, is they
20 gather every single piece of firearm evidence that they can at
21 the scene; correct?

22 A. That's right, sir. If it's -- if it's FBI, if it's ATF,
23 whoever is in charge, they will collect all of them, yes, sir.

24 Q. And at this particular scene, if we look at the paragraph
25 number 10, "no additional," that sentence.

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1 Is it on your screen, sir? I'm sorry?

2 A. I'm sorry. My little -- the picture of myself is covering
3 half the words on the -- on the screen, so I can't.

4 SEAN: Can I do it?

5 MR. ALSAFFAR: Yeah, please do, because that might be
6 a problem later.

7 Is that okay, Your Honor?

8 THE COURT: Yes.

9 THE WITNESS: Thank you, sir.

10 BY MR. ALSAFFAR:

11 Q. Are you ready?

12 A. I am. Yes, sir. Thank you.

13 Q. No, you're welcome. You're welcome.

14 So looking at paragraphs 9 and 10, what we know also in
15 addition to all the guns at the scene were FFL purchased guns,
16 we also know that all the casings, the ammunition that were
17 recovered at the scene, the magazines were all from the AR-15
18 that was purchased at the FFL by Devin Kelley after clearing a
19 background check; correct?

20 A. I believe that's correct, sir, what they collected was
21 from the -- were 5.56 caliber. Yes, sir.

22 Q. Okay. Thank you.

23 If you don't mind, I'd like to transition a little bit
24 into some of the -- some of the roles you were discussing on
25 direct examination, in terms of sort of the ATF roles in these

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1 gun sales, these gun purchases, and how they happen?

2 A. Yes, sir.

3 Q. Now, the NICS system, the FBI NICS system, you are
4 familiar with it; right?

5 A. I am. Yes, sir.

6 Q. It does a really good job of keeping firearms out of the
7 hands of felons; doesn't it?

8 A. They do an amazing job, yes, sir.

9 Q. And just to show you the amazing job that they do, if we
10 can show Plaintiffs' Exhibit 798. This has been admitted into
11 evidence, Your Honor, even though it's PEX 798.

12 This is the most recent FBI data, if we can highlight
13 paragraph -- let's highlight paragraph 1 and 3. This is the
14 most recent NICS FBI data on how many -- how many felons they
15 have prevented from having access to firearms through the
16 background check system; correct?

17 MR. STERN: Your Honor, I'm going to argue that this
18 is cumulative testimony. Deputy Assistant Director Kim Del
19 Greco already testified to this line of questioning.

20 THE COURT: So this is cumulative. What is the
21 purpose of asking him?

22 MR. ALSAFFAR: Well, Your Honor, if they are going to
23 designate an ATF person to talk about background checks, I
24 think it's important that we have as many federal government
25 representatives saying that these things work, because part of

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1 their position, Your Honor, is that they don't work.

2 THE COURT: Yeah. So --

3 MR. STERN: He didn't testify about background
4 checks. He only testified about prohibitors and the sale by
5 Academy.

6 THE COURT: No, I think what Mr. Alsaffar's comment
7 is, yesterday the government seemed to suggest that we
8 shouldn't bother with background checks because they don't
9 work. And so we heard contradictory testimony from the
10 director of NICS and the other groups, so I'll hear from ATF
11 on that.

12 MR. STERN: Your Honor, can I just clarify one point,
13 because the United States' position has never been that we
14 shouldn't bother with background checks. That needs to be
15 clear as a representative of the Department of Justice,
16 because we have never taken the position in this case or
17 anyone else that NICS is ineffective or that we shouldn't
18 bother.

19 We recognize that NICS can be efficient and
20 effective; however, it is limited in scope by the law as
21 written by Congress. And as a result, in Texas, the access to
22 firearms through non-FFLs renders the United States not a
23 proximate cause in this case, because it was not --
24 Devin Kelley's ability to purchase a firearm through an FFL
25 was not a substantial factor.

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1 That needs to be clear. The United States' position
2 has never been that NICS is not efficient, effective, or that
3 we shouldn't bother conducting background checks. I can't --

4 THE COURT: No, I appreciate that stipulation, and I
5 thank you for that because it was sort of coming across
6 yesterday that you were attempting to argue that it wasn't
7 efficient. And so I was questioning, well, then why do we
8 have a NICS chief and the NICS staff and so --

9 MR. STERN: Then, Your Honor --

10 THE COURT: -- thank you for the stipulation and the
11 concession because, you know, it did appear to me that you
12 were arguing otherwise.

13 MR. STERN: If my passion got the best of me, then I
14 do apologize. I am making a tort argument, not a policy
15 argument, and so I just need to be crystal clear that the
16 DOJ's position has never been to impugn the efficiency of
17 NICS. I can't make that position.

18 My position is simply is as a matter of Texas tort
19 law because of the alternative avenues for Devin Kelley to
20 purchase, obtain, or purchase firearms through non-FFLs, that
21 his ability to get guns at FFLs was not a substantial factor
22 in causing this mass shooting.

23 THE COURT: Thank you. So that helps me better
24 understand the government's position here, and so thank you
25 for that.

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1 With that said, you can still ask him questions.

2 MR. ALSAFFAR: Thank you, Your Honor. I'll be brief
3 on this.

4 BY MR. ALSAFFAR:

5 Q. When we look at these two categories, the reason I
6 highlighted these two for you, Mr. Ryan -- and you probably
7 know this better than I do, but those are the two categories
8 that Devin Kelley was convicted on. Is that a fair statement
9 by me?

10 A. Yes, sir. The (g) (1) and the (g) (9), the felony and the
11 MCDV. Yes, sir.

12 Q. So if we look at just those two categories that
13 Devin Kelley was convicted of, that's, doing simple math,
14 that's over 1.1 million denials for people like Devin Kelley
15 that the FBI NICS system has provided for us in this country;
16 right?

17 A. That's correct. Yes, sir.

18 Q. And if you look -- if we pan out just a little bit so we
19 can see the total number. If you don't mind showing the total
20 number of denials.

21 Fair to say that the categories of convictions that
22 Devin Kelley was convicted of consists of a majority of the
23 FBI NICS denials in this country. Is that fair to say?

24 A. Yes, sir. A large percentage, yes, sir.

25 Q. Thank you. You can put it down whenever you are ready.

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1 Now, the reason Devin Kelley was not denied by NICS was
2 because the Air Force didn't do its job; right?

3 A. The records are not in NICS, yes, sir.

4 Q. And but the NICS system is not just about what I was
5 showing you there, it's not just about denying felons access
6 to dangerous weapons; right? It plays many roles, including
7 roles that you at the ATF work with as well. Is that fair to
8 say, sir?

9 A. Yes.

10 Q. The more information that the FBI has on dangerous felons,
11 would you agree that they are the better decisions they can
12 make in preventing individuals who shouldn't have firearms
13 from getting those firearms?

14 A. The better of -- I would agree with that with the caveat,
15 sir, the better information on convictions that they have.

16 Q. Fair enough.

17 When the government agencies don't share data on dangerous
18 and violent felons, they unnecessarily expose the public to a
19 risk of gun violence; is that fair to say?

20 A. Yes, sir. I mean, I wouldn't -- again, the phrasing is
21 not quite the way I would put it. When the information is not
22 put into NICS, NICS can't rely on that to deny. And so if
23 someone is prohibited and the information is not in the
24 system, NICS can't deny that person based on that information.

25 Q. Fair enough.

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1 Would you agree that the more -- that the dangerous
2 felons -- let me take that back.

3 Do you agree Devin Kelley was a dangerous felon?

4 A. Yes, sir.

5 Q. Do you agree that dangerous felons become more dangerous
6 to the public the more weapons they are allowed to accumulate
7 illegally?

8 A. I think as a general statement, I would agree with that,
9 yes, sir, there is a greater public safety risk.

10 Q. So, remember, we're talking about how the NICS system also
11 does other things to keep us safe, not just denying guns to
12 felons, but also working with federal agencies like the ATF;
13 is that correct?

14 A. That's right. Yes, sir.

15 Q. You are familiar with "lie and buy"?

16 A. Yes, sir.

17 Q. And if a criminal -- as an example, and if it's not a good
18 one, tell me, but, for example, if criminal history data is
19 accurately reported to NICS, the ATF actually can help catch
20 people who lie on their Form 4473s; correct?

21 A. That's right, sir. So the information would come in and
22 then a determination could be made whether that person -- a
23 further investigation could occur, yes, sir.

24 Q. And I believe that's no small penalty; is it? It's up to
25 10 years and \$250,000 fine, right?

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1 A. Potentially, sir.

2 MR. STERN: Your Honor, this is now going beyond the
3 scope of direct examination.

4 THE COURT: Sustained.

5 MR. ALSAFFAR: Your Honor, if I may, just for the
6 record -- just before -- just so I can get it on the record,
7 actually, Mr. Stern showed this witness several Form 4473s.
8 This is information that appeared on those forms. He just
9 didn't ask him about it.

10 THE COURT: That's a bit of a stretch. Let's move
11 on. I don't need to know the penalties.

12 MR. ALSAFFAR: Okay. Yes, Your Honor.

13 BY MR. ALSAFFAR:

14 Q. Do you know how much time the -- oh, let me -- before I
15 ask you that question. What I wanted to ask you about this,
16 sort of this part of the interaction with the ATF and the NICS
17 system is that, when a felon lies on those forms, they can be
18 subject to prosecution; right?

19 A. That's correct.

20 Q. Do you know how many times Devin Kelley lied on these
21 forms that would have made him subject to prosecution and a
22 referral to the ATF?

23 A. On these forms, I think there have been -- what? -- three
24 different transactions. For example, the firearms that we
25 talked about here, where he said he was not a felon or not

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1 convicted of an MCDV, a misdemeanor crime of domestic
2 violence. And so I think three in this case is what the
3 answer would be.

4 Q. Well, let me show you Plaintiffs' Exhibit B very quickly.
5 It's just a -- shows a timeline of those purchases. And
6 you'll see the number and then we can get that clear for you
7 on the record.

8 A. Okay.

9 Q. This is Demonstrative Exhibit B.

10 MR. STERN: Objection, Your Honor. I thought my
11 objection was sustained.

12 THE COURT: It was.

13 What's your question now that you are asking him?

14 MR. ALSAFFAR: Your Honor, I'm asking him how many
15 legal purchases he was allowed to make, and that the ATF could
16 have followed up on.

17 THE COURT: Yeah. This is repetitive. I know. I
18 know the answers to this.

19 MR. ALSAFFAR: Okay. You can take that down. Thank
20 you.

21 BY MR. ALSAFFAR:

22 Q. All right. Now, second thing, different than -- that what
23 we were talking about, lying on the form, is, felons -- it's a
24 felony for felons to be in possession; correct?

25 A. That's correct, yes, sir.

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1 Q. And the ATF actually works with United States attorneys in
2 prosecuting felons who are in possession; correct?

3 A. That's correct, sir.

4 Q. And Devin Kelley was a felon, illegally in possession;
5 right?

6 MR. STERN: Again, Your Honor, this is beyond the
7 scope of direct examination.

8 THE COURT: Yeah. This is also not relevant.

9 MR. ALSAFFAR: Okay.

10 BY MR. ALSAFFAR:

11 Q. Well, let me ask you about firearm retrievals.

12 Are you familiar with firearm retrievals?

13 A. Yes, sir.

14 Q. So what we are talking about here is that the ATF, when
15 they learned that a prohibitor, a prohibited individual like
16 Devin Kelly, is in possession of an illegal firearm, they can
17 actually go and get those illegally possessed guns; correct?

18 MR. STERN: Same objection.

19 THE COURT: Yeah. That's not relevant.

20 MR. ALSAFFAR: Okay.

21 BY MR. ALSAFFAR:

22 Q. Do you remember during direct examination you were asked
23 about all the records you reviewed to the Department of
24 Defense Inspector General relating to your conclusions that
25 you were providing -- both here and at the time -- to the

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1 Department of Defense Inspector General?

2 A. Yes, sir.

3 Q. And he showed you the memo that you did. And I can show
4 it to you again. It's Joint Exhibit 9.

5 A. Yes, sir. I remember the memo, yes.

6 Q. I want to show that to you, if you don't mind, and just
7 ask you a couple of quick questions that you weren't asked
8 about on direct on this memo, on this memo.

9 This was the memo you were talking about on direct
10 examination; correct?

11 A. Yes, sir.

12 Q. And, again, that's your signature, even though it's -- you
13 were writing signed for your boss there?

14 A. That's correct. That is my signature.

15 Q. Don't worry. That's okay. I can give you that legal
16 opinion. Nothing wrong with that?

17 A. I appreciate that, sir. Thank you.

18 Q. I want to show you on page 3 of your memo. You had access
19 to Devin Kelley's -- I believe you said to a lot of records in
20 this case file -- that included his mental health history; is
21 that right?

22 A. That's right. Yes, sir.

23 Q. And you put in this, you included in this memo a timeline
24 of that mental health history; is that right?

25 A. That's right. That was based on the documents I was

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1 given. Yes, sir.

2 Q. That was actually based on the Air Force mental health
3 medical records that were provided to you in order for you to
4 make that opinion; right?

5 A. In whatever it was. Peak -- I believe it was Peak -- Peak
6 Behavioral Service as well. I don't know if that was
7 Air Force or civilian, but this is what I received from DOD.
8 Yes, sir.

9 Q. If we look at that section, if we can highlight that
10 paragraph with the dates on it. First, the first one,
11 June 2010 through June 2012. You were stating here that based
12 on your review of the Air Force mental health records, that
13 Devin Kelley essentially was receiving out-patient mental
14 health care almost the entire time he was in the Air Force;
15 correct?

16 MR. STERN: I'm sorry, Your Honor. I'm going to
17 object to relevance. Mr. Ryan has already testified that
18 Kelley wasn't prohibited under (g) (4) and the parties have
19 already stipulated that Mr. Kelley was not prohibited under
20 922 (g) (4) .

21 MR. ALSAFFAR: May I respond, Your Honor?

22 You made a point in your order, your most recent
23 order, that even though he was not a prohibitor, that this
24 type of evidence actually was directly relevant, and it goes
25 to the foreseeability and causation analysis. And if they are

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1 allowed to talk about his mental health on direct, we
2 certainly can go into what he discovered about the Air Force's
3 knowledge, too.

4 THE COURT: That's overruled.

5 BY MR. ALSAFFAR:

6 Q. If we could -- I'm sorry. I couldn't remember the answer.
7 Did you say that's correct, that almost his -- Devin Kelley's,
8 entire time at the Air Force was marked by mental health
9 treatment of some kind?

10 A. I'm sorry. Sir, I don't know off the top of my head what
11 his entire career with the Air Force was, but from June 2010
12 to June 2012, that is correct, he was receiving out-patient
13 treatment.

14 Q. Fair. Fair.

15 He was admitted two different times, voluntarily admitted
16 two different times to mental health facilities while in the
17 Air Force; correct?

18 A. That appears to be the case, yes, sir.

19 Q. And then you note here that on May 14th to 15th, that
20 Holloman Air Force Base put together a high risk for violence
21 responsible team; correct?

22 A. That's right.

23 Q. And you note here that Kelley's -- sorry. Go back to
24 that. We're almost done.

25 You note here in the May 14th and 15th entry that Kelley's

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1 squadron leadership and his mental health providers feel that
2 he's a major threat to commit an act of violence; correct?

3 A. That's right, yes, sir.

4 Q. And that was your ATF conclusion after reviewing all the
5 mental health records; correct?

6 A. That's correct, yes, sir.

7 Q. And you also looked -- this is the Peak medical records
8 you were looking at, if I can show you Joint Exhibit 365. I'm
9 going to show you one page, page 52. This is Joint Exhibit
10 365, page 52.

11 A. Yes, sir.

12 Q. All right. And you see this is from the mental health
13 family advocacy at the Air Force?

14 A. I do, yes, sir.

15 Q. And you see here that it's the May -- it states May -- the
16 date on this is May --

17 If we could show the date, please, Sean.

18 The date on this is May 2, 2012 from the Department of the
19 Air Force; correct?

20 A. That's correct.

21 Q. And if you look at the paragraph now. I'll show that to
22 you.

23 Thank you.

24 It states in the middle there -- do you see "Airman
25 Kelley's condition"? Do you see that?

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1 A. I do, yes, sir. Thank you.

2 Q. In May 2012, the Air Force was stating in his mental
3 health records that Airman Kelley's condition took a rapid
4 decline in February, whereupon he was hospitalized
5 February 23rd, 2012, for depression and possible suicidal
6 ideations. Do you see that?

7 A. Yes, sir.

8 Q. All right. And you remember how in your ATF note, JX 9,
9 you stated that this high risk for violence response team was
10 formed by Kelley's leadership?

11 A. Yes, in the family advocacy program. Yes, sir.

12 Q. Still sticking with these records you reviewed, I want to
13 show you same Joint Exhibit 365. This is page 156. So this
14 relates -- sorry. Page 1. Yeah, you got it.

15 Page 156 of Joint Exhibit 365. This is one of -- this is
16 in May. I believe that's 14th, 2012; correct?

17 A. That's right. Yes, sir. That's the date.

18 Q. And you if you look at the last sentence, "It was agreed
19 that the service member is to be considered high risk for SI
20 and HI, should be he released from the hospital." Do you see
21 that?

22 A. Yes, sir.

23 Q. And that's, SI and HI stands for suicidal and homicidal
24 ideation; is that your understanding?

25 A. That's my understanding. Yes, sir.

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1 Q. Show you one last page from the record you reviewed in
2 forming your memo, 365 -- still Joint Exhibit 365. And this
3 is page 150, and I believe this is dated May 30th, a few weeks
4 later, 2012.

5 A. That's correct.

6 Q. All right. You see that the meeting here, "The high risk
7 for violence response team included Devin Kelley's commander,
8 First Sergeant Security Forces OSI."

9 Do you know what OSI and Security Forces are?

10 A. Yes, sir. The law enforcement arms of the Air Force.

11 Q. And the next sentence states, "In May 30th, 2012, that it
12 was determined by Security Forces and OSI that ADM," that's
13 Devin Kelley, "is a danger to the community." Correct?

14 A. That's right. Yes, sir.

15 Q. All right, and you reviewed his records at the time. You
16 would agree with that, right?

17 A. I agree that's what the records state, yes, sir.

18 Q. And you didn't offer any opinions in your memos or to
19 DODIG that any of this was inaccurate?

20 A. No, sir. I had no reason to believe it was inaccurate.

21 MR. ALSAFFAR: Pass the witness, Your Honor.

22 THE COURT: Anything further, or do you want to
23 break?

24 MR. STERN: Very briefly, but I just have a few
25 questions. So we'll go ahead and then break after, I guess.

WILLIAM RYAN - REDIRECT

1 THE COURT: That's fine.

2 MR. STERN: Thank you, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. STERN:

5 Q. Just briefly, you spoke about a few of the medical records
6 you reviewed when rendering your -- or offering your opinion
7 to DOD Office of the Inspector General; correct?

8 A. Yes, sir.

9 Q. And despite all of those medical records, did you conclude
10 that Devin Kelley was not prohibited under 18 U.S.C.
11 922 (g) (4) ?

12 A. In spite all of those medical records and the things in
13 them, we concluded that he was not prohibited under (g) (4) .

14 Q. As a result, did any of those medical records create an
15 obligation by the Air Force to do anything with regards to
16 preventing Devin Kelley from owning or possessing a firearm?

17 A. Not under the GCA -- or not in regard to the GCA, sir.

18 Q. And we previously talked about how each prohibition is
19 sort of assessed unto itself. Is that fair?

20 A. That's right, sir.

21 Q. There's never a heightened obligation or a lesser
22 obligation to that; correct?

23 A. That's right, sir. If there was a general public safety
24 threat prohibitor, perhaps. That doesn't exist in the
25 statute.

WILLIAM RYAN - REDIRECT

1 Q. And so as a result -- is it fair to say that as a result
2 of Devin Kelley's mental health -- Devin Kelley's mental
3 health records had no bearing on any obligations by the
4 Air Force?

5 A. That's right, sir, under the GCA. That is correct.

6 Q. Thank you.

7 Very briefly, the ATF issued a report of investigation
8 regarding the firearm that was actually used in the mass
9 shooting; correct?

10 A. Yes, sir.

11 Q. And was that firearm that was used the Ruger AR-556, that
12 we previously discussed?

13 A. Yes, it was, sir.

14 Q. And according to your previous testimony, was Academy
15 prohibited from selling that firearm to Devin Kelley?

16 A. It was, sir, yes.

17 Q. So under any -- under that scenario, would Devin Kelley
18 had to have obtained a different firearm, whether through an
19 FFL or a non-FFL, in order to commit that mass shooting?

20 A. I'm sorry, sir. I don't understand the question.

21 Q. In order to obtain an AR-556 to commit this mass shooting,
22 would Devin Kelley had to have obtained the firearm in a
23 transaction other than what actually occurred in April 2016?

24 That was a terrible question.

25 A. I'm sorry, sir.

WILLIAM RYAN - REDIRECT

1 Q. Yeah. Okay.

2 Did Devin Kelley use the firearm that he purchased from
3 Academy to commit the mass shooting?

4 A. Yes, sir.

5 Q. And was that sale a legal sale under federal law?

6 A. It was not.

7 Q. So if Devin Kelley was going to obtain an AR in order to
8 commit this heinous act, would he have had to obtain a gun
9 elsewhere?

10 A. If he had been denied at Academy, he could have obtained
11 -- or would have had to obtain a gun elsewhere, sir.

12 Q. Whether that be through an FFL or a non-FFL?

13 A. It could have been an FFL, a non-FFL, or however. It
14 would have had to have been another means.

15 Q. A different sale?

16 A. Yes, sir.

17 MR. ALSAFFAR: Thank you. No further questions.

18 MR. STERN: Nothing further, Your Honor.

19 THE COURT: Any further need for this witness?

20 MR. ALSAFFAR: No, Your Honor.

21 MR. STERN: No, Your Honor.

22 THE COURT: Thank you, sir. You are excused.

23 Let's go ahead and take a 15-minute break.

24 (Recess.)

25 THE COURT: Your next witness.

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1 MS. CHRISTILLES: The United States calls Stephen
2 Barborini.

3 THE COURT: Swear him in.

4 (STEPHEN BARBORINI, having been duly sworn, testified as
5 follows:)

6 DIRECT EXAMINATION

7 BY MS. CHRISTILLES:

8 Q. Good morning, Mr. Barborini. I'm Jacquelyn Christilles.
9 We've talked on the phone a couple of times.

10 Can you please introduce yourself to Judge Rodriguez?

11 A. Stephen Barborini, B-A-R-B-O-R-I-N-I.

12 Q. Mr. Barborini, are you having some audio issues?

13 A. I don't believe so. I hear myself on sort of an echo.

14 Can you hear me?

15 Q. I can hear you. I'm just making sure that you can -- I
16 heard a pause when you were introducing yourself, so I was
17 making sure that your audio was working okay.

18 A. I'm good.

19 Q. All right. Mr. Barborini, what is your present
20 employment, including your position and title?

21 A. I'm currently a detective on a part-time basis, 28 hours a
22 week for the Palm Beach County Sheriff's Office located in
23 West Palm Beach, Florida. I'm assigned to the violent crime
24 division to a subunit called the firearms investigative unit.

25 Q. So you indicated that on a part-time basis you work for

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1 the Palm Beach County Sheriff's Office in a specialized unit.

2 What do you do in that specialized unit?

3 A. Our unit, which basically consists of myself, a NIBIN
4 tech, an analyst from -- a crime analyst -- that deals with
5 firearms investigations, and now we actually have a detective
6 assigned -- another detective, part-time assigned, a gang unit
7 detective.

8 My job is multifaceted. In the morning, the guns that
9 come in, myself and the NIBIN tech look at the guns that come
10 in. We compare what's on the box to what is really in the box
11 because there's many mistakes. We take that information and
12 correct any mistakes. We then use that information to trace
13 the guns, myself and the analyst, trace these firearms through
14 the ATF Tracing Center.

15 We also -- we have a crimes lab that shoots more of the
16 high-priority guns. I and the NIBIN tech, shoot the lower
17 priority guns. We did get over 1500 guns last year, so it's a
18 bunch of guns.

19 Besides that, I also create training for PDSO and firearms
20 identification and investigations, as well as I also am a,
21 sort of a person here that goes to review social media,
22 cellphone downloads, and computers, photographs of firearms to
23 attempt to make criminal cases where felons are displaying
24 firearms so we can get either a search warrant or to assist in
25 a sentencing or actually to get arrest warrants.

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1 Q. How long have you been a part-time detective for the Palm
2 Beach County Sheriff's Office?

3 A. Since March of 2012.

4 Q. Do you currently have any other employment besides your
5 part-time employment with the Palm Beach County Sheriff's
6 Office?

7 A. Yes. I'm contracted with the Bureau of Alcohol, Tobacco
8 and Firearms, the ATF, to instruct both at the National
9 Academy in Glynco, Georgia, as well as on the road. And the
10 subject matter is basically firearms identification, firearms
11 technology, and firearms trafficking.

12 Q. Were you employed prior to the Palm Beach County Sheriff's
13 Office and your part-time instructing with ATF?

14 A. Yes. For 25 years, I was a special agent with the Bureau
15 of Alcohol, Tobacco, and Firearms. The last four and a half
16 years, I was the resident agent in charge of the local area
17 that the West Palm Beach field office served.

18 Q. So how long were you employed by ATF in total?

19 A. Just about 25 years.

20 Q. What is the mission of ATF?

21 A. Investigate violations of the firearms and explosives and
22 arson laws.

23 Q. As a special agent, what were your duties?

24 A. I investigated mostly firearms violations. That was about
25 85 to 95 percent of our work. Felons in possession, firearms

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1 trafficking, people -- dirty gun dealers, importers, as well
2 as street crimes. Occasional, I worked pipe bomb cases and as
3 well as commercial arson cases.

4 Q. Did you have any other law enforcement employment prior to
5 your time at ATF?

6 A. Before that, I was just over a year with the U.S. Marshal
7 Service. And before that, I was approximately seven years as
8 a police officer. I worked patrol. I worked as a crime
9 scene. I worked as a detective. And then last was a road
10 patrol sergeant.

11 Q. Have I covered all the employment history relevant to your
12 testimony today?

13 A. Yes.

14 Q. I want to talk to you a little bit about your education.
15 Do you hold any degrees?

16 A. A bachelor's degree in criminal justice.

17 Q. Besides your bachelor's degree, do you have any
18 specialized training specifically as it relates to firearms?

19 A. Yes. The training -- actually, the training started -- a
20 lot of personal training, because I did collect firearms at a
21 young age as well as personal interest as well as research.

22 Professional training was at various police academies to
23 include the ATF Academy, which is now in Glynco, Georgia at
24 F-L-E-T-C, and that training is -- we have, obviously, this
25 four or five days with nothing but firearms identification and

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1 trafficking training as well as firearms law training.

2 After that, I went to a couple of advanced schools at
3 FLETC. I also went to armored schools, both Glock, Remington,
4 and six-hour armored schools.

5 Because of my knowledge in firearms, I was asked to --
6 to -- it's called the firearms nexus training, where there's
7 really no schools we can go, so to learn more about firearm's
8 function and identification, we actually tour factories. So
9 part of our training is to actually go to firearms factories
10 in the United States first, you know, normal factories, Colt,
11 Remington, and whatever.

12 And from there, we also go to museums, which continued
13 throughout my career. For a very short time, ATF did have
14 some funds. We -- they wanted 24 people that over a
15 three-year period was chosen to go to Europe, and we actually
16 toured factories, proof houses, and museums throughout Europe,
17 and continued to go to through these factories tours until
18 COVID hit.

19 ATF hired me, sort of, to set up factory tours in Florida,
20 places like Taurus, Rossi, Diamondback Firearms, Caltech, and
21 Knights Armament Corporation, and that stopped when COVID hit,
22 as well as sell -- going to, on my own, going to -- I go to
23 the shot show year every year, except for this year because of
24 COVID, which is the largest place where you can look at
25 firearms in the United States as well as personal tours of

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1 firearms and museums.

2 Q. Now, I'm going to show you JEX 621, which has been
3 previously admitted. Do you see that up on your screen there?

4 A. Yes, it's my CV.

5 Q. I think you broke up there a little bit, but I think that
6 you indicated that this is your CV; is that correct?

7 A. That is correct.

8 Q. So you recognize this document as your CV?

9 A. Yes, I do.

10 Q. Does your CV accurately reflect your employment, your
11 education, and your training?

12 A. Yes.

13 Q. Now, you talked a little bit about the training that you
14 received, some of the proof houses, and gun manufacturer
15 facilities that you have toured.

16 Have you also instructed courses on firearms?

17 A. Yes. Starting in approximately 1998, '99, I teach the
18 firearms technology Glock. Now it's known as the GCA NFA
19 class, which basically starts with -- if you know nothing
20 about firearms, or something, we start at the beginning, with
21 anti-condition systems, all the way through modern firearms,
22 how they function, as well as the laws that apply to those
23 firearms. And also, of course, things change. We also talk
24 about various conversions to machine guns, common conversions
25 for Glocks, and AR-15s, for instance. Of course, now ghost

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1 guns and silencers. So it's basically -- that's the basic
2 firearms class ATF agents get.

3 I also teach -- up until last year, I was teaching
4 firearms trafficking, so we teach how to investigate people
5 that traffic firearms, whether it's interstate, intrastate, or
6 internationally.

7 Q. So I think that you have indicated that through your
8 professional employment and training, you've gained expertise
9 in firearms generally; is that fair to say?

10 A. Yes.

11 Q. You indicated that you've taught on conversions for
12 firearms. Would it be fair to say that your professional
13 employment and training has helped you gain expertise on
14 firearms, accessories, and conversions?

15 A. Yes.

16 Q. When we are talking about conversions and accessories,
17 does that include aftermarket modifications for firearms?

18 A. Yes.

19 Q. You've talked a little bit about firearms trafficking.
20 Does that mean you have expertise in firearm sales?

21 A. Yes.

22 Q. Does that expertise include firearm sales by federally
23 licensed firearm dealers?

24 A. Yes.

25 Q. How about sales outside of federally licensed firearm

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1 dealers, and if you wouldn't mind if I use the term "FFL," can
2 we agree that I'm talking about federally licensed firearm
3 dealers?

4 A. Sure.

5 Q. Okay. So have you gained any experience, or do you have
6 expertise on sales of firearms by non-FFLs?

7 A. Yes.

8 Q. You also gained experience on illegal firearm sales?

9 A. Yes.

10 Q. Have you been accepted in both state and federal courts as
11 a qualified expert to testify on firearms, firearm
12 modifications, and sales of firearms?

13 A. Yes. Well, I taught the firearms trafficking, firearms
14 identifications, the -- also the information needed for sale
15 of a firearm from an FFL.

16 Q. Is your testimonial history reflected on your curriculum
17 vitae?

18 A. Yes.

19 Q. I want to turn to your review in this case.

20 What, generally, just generally, were you requested to do
21 in this case?

22 A. Oh, the screen just changed -- okay.

23 Basically, alternative ways to purchase firearms other
24 than a federal licensed firearms dealer.

25 Q. With regard to Devin Kelley and the shooting that he

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1 committed on November 5th, 2017 at the First Baptist Church of
2 Sutherland Springs, can we agree that when I refer to "the
3 shooting," that that's what I'm referring to?

4 A. Yes.

5 Q. Did you prepare a report concerning the alternative means
6 of obtaining a gun as it would have related to Devin Kelley?

7 A. Yes.

8 Q. Did you ever supplement that report?

9 A. Yes.

10 Q. What material did you review in creating your original
11 report?

12 A. I reviewed the Texas Ranger report, ATF report,
13 photographs that was also in the Texas Ranger report,
14 Department of Defense report, and Danielle Kelley and I think
15 the father's deposition.

16 Q. Now, you've indicated that you supplemented your report.
17 Why did you supplement your report?

18 A. I was given a deposition from the father about -- mostly
19 about gun storage, so after I read that, I supplemented.

20 Q. Do your reports include conclusions regarding the firearms
21 issues in this case?

22 A. Yes.

23 Q. Did you use your knowledge, skill, experience, training,
24 and education to analyze the firearms issues in this case?

25 A. Yes, I did.

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1 Q. Do you believe your testimony will be helpful in assisting
2 the judge to understand the facts of this case?

3 A. Yes.

4 MS. CHRISTILLES: Your Honor, at this time, we tender
5 Mr. Barborini as an expert in firearms, firearms accessories,
6 and aftermarket modification, and alternative sales of
7 firearms.

8 THE COURT: Any objection?

9 MR. LeGRAND: Your Honor, we have no objection on
10 those specific areas.

11 THE COURT: He's recognized as such.

12 BY MS. CHRISTILLES:

13 Q. Mr. Barborini, in general terms, what did you -- what did
14 you find with respect to whether or not Devin Kelley would
15 have obtained a firearm, even if his information had not been
16 entered into NICS?

17 MR. LeGRAND: Your Honor, we object.

18 That's completely outside the areas that they just
19 designated him in. He is not qualified in any way whatsoever
20 to testify as to what Devin Kelley would have done.

21 MS. CHRISTILLES: Your Honor, I asked in general
22 terms. He looked at the firearms issues in this case with
23 regard to Devin Kelley, that's what he indicated, and he
24 indicated that he looked into the issues of purchases outside
25 of an FFL.

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1 THE COURT: Yeah. So he's been recognized as an
2 expert in alternative sales, and so this broadly fits into
3 that category.

4 Restate your question for me.

5 MS. CHRISTILLES: Yes, Your Honor.

6 In general terms, what did you find with respect to
7 whether or not Devin Kelley would have obtained a firearm,
8 even if his information had been entered into NICS?

9 MR. LeGRAND: Your Honor, we object to the word
10 "would." He is designated as an expert in "do these markets
11 exist," and "could he have attained a firearm from some other
12 source," but whether he would or not requires lots of
13 expertise concerning human behavioral psychology, various
14 other subjects.

15 THE COURT: That's sustained.

16 So you can get there. You're just using the wrong
17 verbiage.

18 MS. CHRISTILLES: Yes, Your Honor.

19 BY MS. CHRISTILLES:

20 Q. Mr. Barborini, in general terms, what did you find with
21 respect to whether or not Devin Kelley could have obtained a
22 firearm, even if his information had been entered into NICS?

23 A. Yes. Very easily he could have purchased firearms from
24 alternate methods, alternate places.

25 Q. Are your opinions reflected in your report and your

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1 supplemental report?

2 A. Yes.

3 MS. CHRISTILLES: Your Honor, at this time, the
4 government offers GEX 30 and GEX 154 into evidence.

5 MR. LeGRAND: Your Honor, we object. Those are his
6 reports. They are repetitious. They are hearsay. And he's
7 here to testify. And if they want to ask him a question about
8 his reports, they are free to do so.

9 And we further object to the reports because in some
10 areas there are certain sentences that suggest what
11 Devin Kelley would have done under certain circumstances. And
12 we object to that because he's not qualified. There is no
13 foundation for those opinions, and it's speculation on his
14 part.

15 THE COURT: Yeah. Generally, expert reports don't
16 come in. Is there some exception?

17 MR. LeGRAND: No, Your Honor.

18 THE COURT: I'm talking to her.

19 MR. LeGRAND: I'm sorry. I apologize.

20 THE COURT: I knew what your answer was.

21 MR. LeGRAND: Yes, sir. I accept that.

22 MS. CHRISTILLES: Your Honor, as you have indicated
23 many times during this case, this is a bench trial. There is
24 no jury. Mr. Barborini is here testifying in court, is
25 subject to cross-examination by plaintiffs' counsels. The

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1 parties have already given this Court almost a thousand pages
2 of documents to review. We believe that it will be helpful to
3 the Court to also have the expert reports available while you
4 are making your decision, and Your Honor has already reviewed
5 in totality two of plaintiffs' experts reports in motion
6 practice for this case.

7 THE COURT: Yeah. So here, though, if I let the
8 expert reports in, extraneous matter might come in that I'm
9 not supposed to be taking into account. So 30 and 31 are not
10 admitted.

11 MS. CHRISTILLES: And it would be 30 and 154, Your
12 Honor, just for the record, I believe.

13 THE COURT: Oh, I'm sorry. So it's GEX 30? I
14 thought you said 31. What's the other one?

15 MS. CHRISTILLES: GEX 30 is the --

16 THE COURT: That's the Barborini report.

17 MS. CHRISTILLES: Yes. And then 154 should be the
18 supplemental report, if I have my numbers here correctly, Your
19 Honor. Yes. 154 would be his supplemental report.

20 THE COURT: Yeah, that's not admitted.

21 Oh, and, by the way, while I'm doing clean up, so
22 I've taken a look at your -- the objections to the learned
23 treatise doctrine.

24 The government's request to have all those exhibits
25 admitted into evidence is denied. There's no exemption

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1 applicable. I'll clean up later. Someone remind me about
2 which exhibit numbers are not admitted.

3 Go ahead.

4 MS. CHRISTILLES: Yes, Your Honor.

5 BY MS. CHRISTILLES:

6 Q. And I know I've already asked this question, but just
7 because we got off track there a little bit I want to make
8 sure that we're refocusing here.

9 I think you stated that you did come to an opinion on
10 whether or not Devin Kelley could have obtained a firearm even
11 if his information had been entered into NICS. And in general
12 terms, what was that opinion?

13 A. Yes, very easily from various methods.

14 Q. Now, I use the word "NICS," are you familiar with what
15 NICS is?

16 A. Yes, the National Instant Background Check, basically.

17 Q. What is NICS used for?

18 A. When you --

19 MR. LeGRAND: Your Honor, we object. This witness
20 has not been designated as an expert on NICS.

21 THE COURT: So that's -- that's overruled.

22 BY MS. CHRISTILLES:

23 Q. In your experience, what is NICS used for?

24 A. When you purchase a firearm from an FFL, after you've
25 filled out the ATF Form 4473 and give your biographical

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1 information, then the gun dealer, federal or state, either by
2 phone or by computer, then runs your -- runs your information
3 through CJIS, which is basically a criminal record background
4 check.

5 Q. Is there any way to obtain a weapon besides purchasing one
6 from an FFL?

7 A. Yes.

8 Q. Would you refer to that as a secondary market?

9 A. Yes.

10 Q. What are the types of secondary markets that you are
11 familiar with?

12 A. Gun shows, the internet, newspapers, friends, ghost guns,
13 and straw purchases, and a straw purchase from an FFL.

14 Q. Are these secondary --

15 A. It is a secondary market. It would be a secondary person.

16 Q. So just to make sure, we've got gun shows, flea markets,
17 online, newspaper, friends, ghost guns, and then a straw
18 purchase would kind of be lumped in there; would you agree?

19 A. Yes.

20 Q. Are these secondary markets considered underground
21 markets?

22 A. No. It's considered basically -- for instance, a gun show
23 or even internet, it could be a private sale. So, I mean, I
24 buy -- I've bought guns at gun shows without background
25 checks, so it's not underground at all. It's in the open.

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1 Q. And you indicate that you buy guns at gun shows. I'm
2 assuming you are not a prohibited purchaser.

3 A. Assuming I'm not, yes. I'm sure I'm not.

4 Q. So is it fair to say that people who are legally allowed
5 to buy weapons utilize these secondary markets?

6 A. Correct.

7 Q. They utilize these markets without concern that something
8 nefarious might happen during the sale?

9 A. Yes. Yes. It's legal, unless they are prohibited, and
10 then that would be a problem if we know about it, but we don't
11 know when people do private sales.

12 Q. And I want to go into that a little more. You indicated
13 that there's no laws prohibiting those sales, so is it fair to
14 say that there are no laws prohibiting sales between private
15 parties?

16 A. I believe there's not a law about private sales. And
17 Texas, like Florida, is an open state, where there is no
18 registration or permit requirement.

19 Q. You used the term "open state," and you indicated that
20 Florida and Texas are open states; is that accurate?

21 A. Yes.

22 Q. Are there states that are not, quote, unquote "open
23 states"?

24 A. Yes. States -- mostly, they are northeast, such as like
25 New York. You have to have a permit to buy a -- buy a

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1 firearm, so it would not be a state where I can just walk in
2 and buy a gun and take it that day or do any private sale
3 since guns have to be registered.

4 Q. So do sales between private individuals require a
5 background check in Texas?

6 A. No.

7 Q. So is it fair to say that Texas is different from other
8 states with regard to non-FFL sales?

9 A. It's an open state, so it's -- actually, most states are
10 open states in my experience. There's no requirement for
11 background checks on private sales.

12 Q. I want to shift gears and talk about these secondary
13 markets that you've indicated. Let's start with gun shows.
14 What exactly is a gun show?

15 A. A gun show is a place where both FFLs and private
16 individuals or hobbyists can display their firearms for sale
17 where you can -- where a private individual actually can have
18 a table at the gun show and they can sell guns to enhance
19 their collection, buy guns without background checks.

20 And FFLs are also at gun shows. Of course, when they sell
21 at gun shows, they are allowed to sell, other than a licensed
22 premise, and they have to complete the ATF forms and the
23 background checks.

24 Q. So at gun shows, there can be FFLs and non-FFLs selling
25 firearms; correct?

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1 A. Correct.

2 Q. What types of firearms are sold at gun shows?

3 A. Everything from antiques to collectible guns to brand new
4 guns.

5 Q. You indicated that brand new guns are for sale at gun
6 shows; is that accurate?

7 A. Yes.

8 Q. So are new guns only available for sale from FFLs at gun
9 shows?

10 A. Oh, not at all. Many private individuals have brand new
11 guns or appear to be brand new guns. You can't really tell if
12 they are brand new. They're in the box with the original
13 paperwork and they are for sale from private individuals as
14 well as licensed dealers, FFLs.

15 Q. So at a gun show, a private seller could be selling a
16 brand new in the box gun; is that accurate?

17 A. Yes.

18 Q. So you wouldn't say that only defective guns are for sale
19 at gun shows; correct?

20 A. No, not at all.

21 Q. Now, you said sometimes it's hard to tell whether or not
22 it's a brand new gun, but it's in the box. Are brand new guns
23 never fired?

24 A. No. Manufacturers, when they make a firearm, they shoot
25 them. So if you look at a brand new gun, it's actually --

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1 you'll see some residue in the barrel because they shoot them.
2 It's called proof test. They usually shoot them with an
3 overload, and if they survive the overload, obviously, for
4 liability reasons they do it. So if somebody shoots a gun and
5 said it blew up when they shot factory ammunition, they show
6 that we shot this with a proof load, so it must be something
7 you did.

8 Q. In your experience, have you actually seen new guns for
9 sale at gun shows from non-FFLs?

10 A. Oh, yes, many times. Actually, both in criminal
11 investigations where the private seller oversteps private
12 sales, and we see these people all over the State of Florida
13 selling guns that are new where they will buy brand new guns,
14 a multiple purchase, and then take them right to the gun show
15 and sell them to people without background checks.

16 Q. Now, you said they overstep. What's the difference
17 between a private seller that's allowed to sell a brand new
18 gun at a gun show and somebody who oversteps?

19 A. The law basically says anybody that devotes time and
20 attendance to the repetitive sale of firearms for profit needs
21 to get a federal firearms license, which is a very gray area,
22 so we've -- if you see somebody with brand new guns, or even a
23 lot of used guns, let's say in Ft. Lauderdale, Florida, the
24 next day -- next weekend he's in West Palm Beach.

25 We get complaints from licensed gun dealers who say, "Hey,

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1 this guy is all over the State of Florida. I've actually seen
2 him in Texas and Oklahoma. Why do I have a license, when this
3 guy is buying guns and flipping them without any paperwork"?

4 Q. Have you actually attended gun shows as part of your
5 professional employment?

6 A. Yes. I actually ran the gun show task force throughout
7 the State of Florida in 1996 and '97. And then here, I had a
8 gun show task force from 2008. So December 2012. I
9 occasionally still assist with it at the Palm Beach County
10 area.

11 Q. I think you mentioned it earlier. Have you also attended
12 gun shows in your personal capacity?

13 A. Oh, yeah.

14 Q. How many gun shows would you say that you have attended in
15 your lifetime?

16 A. Just in 1996, I attended 50 in one year, so it's going to
17 be in the hundreds.

18 Q. What percentage of those gun shows that you have attended
19 had new or like new firearms for sale from non-FFLs?

20 MR. LeGRAND: Your Honor, we object. That calls for
21 speculation.

22 THE COURT: That's overruled.

23 THE WITNESS: Other than the gun show that's local,
24 that's for antique guns, basically all of them.

25

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1 BY MS. CHRISTILLES:

2 Q. So is it fair to say that new guns are available without a
3 background check from non-FFLs at a gun show?

4 A. Yes. Guns that are brand new or appear brand new, because
5 you really can't tell.

6 Q. Are you aware of the firearms that were recovered from the
7 scene of the shooting?

8 A. Yes.

9 Q. Did the investigation determine if all of the firearms
10 were used by Kelley to perpetrate the shooting?

11 A. Except for the Ruger 22 pistol, it was not used.

12 Q. Okay. So the Ruger 22 pistol was not used; is that
13 accurate?

14 A. Yes.

15 Q. So what weapons were used in the shooting?

16 A. The AR-15 and the Glock 19.

17 Q. Now, you've called it an AR-15. I've also called it an
18 AR-556. Help me clear up the difference there.

19 A. Well, AR-15 is basically the most popular rifle in the
20 United States. There are well over a hundred brands of
21 AR-15s. They started back in the '50s, developed by Eugene
22 Stoner in the military, and that's now morphed into hundreds
23 and hundreds of brands of semiautomatic versions of the
24 military M16 rifle.

25 SR556, AR-556, they are both AR-15 type rifles. They are

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1 just -- there are names for them.

2 You remember AR-15 rifles, they have to be the same, as
3 far as the receivers, because the aftermarket parts have to
4 fit. So the lower receiver and the upper receivers are all
5 the same, they just, as far as a Milspec, to accept the
6 trigger or whatever.

7 So it was just Smith & Wesson has an MD15. I'm going to
8 say the Army has a PA-15, so... And then Ruger has an AR-556
9 and an SR556, and there's hundreds and hundreds of companies,
10 but it's the same basic rifle.

11 Q. So where in the spectrum is the AR-556? Is it the
12 absolutely best AR-15 sold on the market? Is it the worst?
13 Where does it fall on that spectrum?

14 A. It's considered an average, so it's a middle-of-the-road
15 AR-15.

16 Q. So I think what you are saying is there are brands of
17 cars, like Ford, Chevy, just like there are brands of AR-15,
18 and the AR-556 is the mid-range AR-15?

19 A. Yes. Yes.

20 Q. Would the AR-556 be generally available at a gun show?

21 A. It could be. I mean, the gun shows that are -- especially
22 the last 15 years, probably the most popular rifle are the
23 AR-15s. You could find an AR-556, but I'm not saying every
24 show you have an AR-556. There will be plenty of AR-15s.

25 Q. So not every show might have the Ruger AR-556, but how

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1 many would have a different brand of AR-15?

2 A. Oh, all except the antique shows will have AR-15s.

3 Q. And you talk about the AR-556 kind of being in the middle
4 spectrum. Are there other AR-15s that are kind of in that
5 middle spectrum with the AR-556?

6 A. Yeah. Such as, like the Smith & Wesson, the Bushmasters,
7 the Remingtons, the Armories, they are all -- I just went to a
8 gun show a couple weeks ago, and it was plenty of those type
9 of guns. Of course, the price is a lot higher now.

10 Q. So I think you mentioned this. The gun show you went to
11 last weekend, plenty of AR-15s available. Did I hear that
12 correctly?

13 A. Yes.

14 Q. Would an AR-15 be available in a new condition from a
15 non-FFL at a gun show?

16 A. Yes.

17 Q. Have you personally seen a new AR-15 available from a
18 non-FFL at a gun show?

19 A. Yes.

20 Q. How about the Glock 9mm? Have you seen a new Glock 9mm
21 available from a non-FFL at a gun show?

22 A. Yes. Or appears new, original box and papers.

23 Q. How often do you see Glock 9mms at gun shows?

24 A. Glock is the number one selling handgun, in Florida
25 anyway. Very popular. And I see them. Just at the last show

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1 there were plenty of Glocks from both FFLs and non-FFLs.

2 Q. You indicated that the Glock is the number one selling
3 handgun. Did I get that correct?

4 A. From my research here, I'm looking both at what I see at
5 the gun shows, and also what I see in evidence. We took in
6 1500 guns, and it's -- I don't know how many thousand brands
7 of firearms. Last year, 18 percent of the guns were Glocks.
8 Not because they were used in crimes, but many are stolen from
9 legitimate citizens.

10 Q. You said many are stolen from legitimate citizens?

11 A. Yes.

12 Q. What makes the Glock so popular?

13 A. Well, it's the first mass produced polymer striker fire
14 pistol that passed all the torture tests in the '80s, so the
15 police department started accepting them and using them. They
16 are cheaper than the metal guns back then, including PBSO.
17 You have 3,000 here.

18 So and, of course, once police and military use them, then
19 you know, citizens also use them. They are very reliable.
20 They are very easy to shoot. You pull the trigger. It goes
21 off. There's no real manual safety to turn on and off. And
22 so actually (audio transmission gap).

23 Q. You indicated that it's a polymer weapon. What is
24 polymer?

25 A. Well, it's like a plastic. The frame and receiver, the

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1 bottom part is polymer.

2 Q. And we've talked about the AR-15 and the Glock being
3 available at a gun show from a non-FFL. Is a background check
4 required to purchase a weapon from a non-FFL at a gun show in
5 Texas?

6 A. No.

7 Q. Do you have any experience with individuals buying
8 firearms at gun shows where those individuals would otherwise
9 be prohibited from buying a firearm from an FFL?

10 A. Yes.

11 Q. You also talked about online sales, so I want to shift to
12 online sales. How would an individual purchase a firearm
13 online?

14 A. Just people used to advertise in newspapers, which is sort
15 of rare. When they sell guns now it's basically done online.
16 For instance, Armslist, Guntraders, and, plus, every website
17 actually that deals in collecting guns usually has a buy-sell
18 page, when it's something like Armslist.

19 We have Florida Gun Traders, because of Texas Gun Trader,
20 which I joined, I think back in June -- and within 15 minutes,
21 I found people. If I could meet them in Texas, I could have
22 bought an AR-15 rifle and a Glock, and they were non-FFLs.

23 Q. So you indicated that you actually joined some of the
24 online forums for buying guns in Texas; is that accurate?

25 A. Yes.

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1 Q. And you indicated that within 15 minutes, you could have
2 purchased an AR-15 and a Glock; is that accurate?

3 A. Correct.

4 Q. Would a background check have been required for you to
5 purchase that AR-15 or the Glock that you found on Texas Gun
6 Traders?

7 A. Well, the people that were advertising were not dealers,
8 so I would have to meet them in Texas, obviously, meet them in
9 a parking lot to consummate the deal, but I wouldn't -- not
10 have to have a background check.

11 Q. Are new guns available through these online forums?

12 A. Oh, yes.

13 Q. Now, I think you talked about the Texas Gun Traders, and
14 you actually going to that site. In your professional
15 experience, besides that do you have other experience with
16 purchasing firearms online without a background check?

17 A. Oh, yes. As an agent with ATF I purchased everything from
18 normal guns to machine guns from people without background
19 checks.

20 Q. Have you also done some work outside of the ATF concerning
21 online purchases of firearms without a background check?

22 A. Yes. In 2012 I was approached by the Today show about the
23 ease of buying guns, online sales with a background check, so
24 I agreed to do it. And we went and met in Arizona, another
25 open state, and we went to an internet buy-sell site called

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1 Backpage, which is now no longer, this is 2012, where
2 basically I just looked for ads for guns and I would use my
3 iPad and I set up buying the guns and setting up the meeting
4 places where instead of me being the person that met these
5 people for the final sale, I set up the deal and then they
6 would show up.

7 It was a male and female actor and they would buy the gun
8 without any background checks. And also after they bought the
9 gun from these people, which they actually told the people,
10 "Thank you for selling me the gun. I probably couldn't pass a
11 background check anyway," nobody asked for the gun back.

12 All those guns that we bought, a Glock and AR-15, after
13 our investigation was over it was on the Today show, and those
14 guns were turned over to Phoenix PD.

15 Q. You indicated in that Today show work you purchased an
16 AR-15 and a Glock online. Is that accurate?

17 A. Correct.

18 Q. Now, in addition to gun shows and online sales, you also
19 mentioned something called a straw purchase. What is a straw
20 purchase?

21 A. A straw purchase is where somebody, usually a prohibited
22 person, or maybe it's somebody that doesn't want their name on
23 the ATF Form 4473 because they want to commit a crime or ship
24 the guns either out-of-state or to a gang or internationally,
25 they will send a straw purchaser in, which means the straw

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1 purchaser goes to the FFL, fills out the form, but the true
2 buyer is the person that doesn't want their name on the form
3 so they will provide the money and buy the gun.

4 So if the gun is ever traced, it comes back to the straw
5 purchaser, not total actual possessor or the actual purchaser.
6 It goes back to the straw purchaser which has no interest in
7 the gun. We see many of those and work them both from FFLs at
8 gun shows.

9 Q. So how would an FFL know if the weapon is being purchased
10 for someone else in a straw purchase type of scenario?

11 A. If the FFL is -- they are actually training the other guy
12 to FFLs, or if they suspect the straw purchase they should
13 stop the sale. But in our experience, my experience actually,
14 we actually -- actually during gun shows because gun shows are
15 so crowded we see people -- we have people outside the gun
16 show, usually local police that could identify that the gang
17 members, the felons, people that shouldn't be there, and if
18 they are at a gun show they are going to buy a gun or ammo.

19 We follow these people around. Or a gun dealer will call
20 us. And they may approach a table many times with a
21 girlfriend or a wife. We will see that person that we know is
22 prohibited, pick up a gun, look at a gun. And they will walk
23 away. And then the female that is with them -- usually it's a
24 female, will fill out the paperwork, get the gun. And later
25 on we do a traffic stop and find out who the true purchaser

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1 is.

2 Q. You talked a little bit about -- I know we've talked about
3 gun shows, but you just brought something up. You talked
4 about having your agents at a gun show and it's very crowded
5 and you used the word "gang members and felons." When you are
6 working a gun show, are you just randomly targeting people to
7 determine if there is some type of sale where a background
8 check might be required?

9 A. No. Information usually comes from either a gun dealer
10 that suspects it, or from one of the local either ATF. Local
11 cops usually that know these people that say so-and-so is in
12 the show, he shouldn't be here, he's a felon. And that's how
13 we spot them. Either somebody buys from a collector or a
14 private sale, or they will buy it using a straw purchaser from
15 an FFL.

16 Q. Now, what if a parent buys a firearm for a child. Is that
17 considered a straw purchase?

18 A. No. That's a gift exception. You can buy your -- you
19 know, obviously a child, a gun, if your child is a convicted
20 felon -- if your child is a convicted felon and you know it,
21 then that would be a straw purchase. But, no, you can buy
22 your child a gift.

23 Q. How about a wife buying a firearm for her husband. Is
24 that considered a straw purchase?

25 A. No. Only if she knows he's a prohibited person and can't

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1 buy the gun, then it would be. Otherwise, it would just be a
2 gift.

3 Q. Now, you also used the term "ghost gun." What is a ghost
4 gun?

5 A. A ghost gun, I guess, is a term used by the news for a gun
6 that's untraceable. It's been a problem lately. The last
7 five or six years it's gotten a lot worse because of the
8 polymer kits. Polymer kits are so easy.

9 For instance, a Polymer80 is probably one of the
10 highest-selling kits in the United States. Some states are
11 making it illegal right now.

12 So the Polymer80 kit, they basically sell mostly Glock
13 kits and AR-15 kits. So you get this piece of plastic that
14 looks like the lower receiver or a frame of a Glock. But it
15 comes in a jig. It comes with little pieces you have to put
16 in it, as well as drill bits.

17 So when you get the gun, it's also there is an 80 percent
18 gun. ATF advises in that form, it's not yet a firearm. So
19 once you go to YouTube — usually that's the best way to learn
20 how to do it, and use hand tools, and they provide everything.
21 You need maybe a pair of snips and a little file and a drill.

22 It's all there. The kit tells you where to drill. You
23 put in a couple parts. And at that point, you've made a
24 firearm, because that's the control item. And it's legal,
25 because federally it's legal to make your own firearm.

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1 So everything else -- that's the only controlled item. So
2 a convicted felon cannot have that piece.

3 Now, everything else, let's say an AR-15, Glock, the
4 barrel, the triggers, some of these are all -- they are not
5 regulated, so everything else you can either buy at a gun show
6 or online or buy at the gun store.

7 Q. So that was a lot of information so I'm going to break
8 that down a little bit. So a ghost a gun is an untraceable
9 gun. That's really what that term means; is that correct?

10 A. Correct.

11 Q. Okay. And then you talked about Polymer80 kits. Are
12 those often referred to as 80 percent kits?

13 A. It's one of the brands of 80 percent kits, yes.

14 Q. So there is 80 percent kits. There's different brands.
15 Polymer80 is the most popular?

16 A. Correct.

17 Q. Okay. And with one of these 80 percent kits, you can
18 assemble a firearm; is that correct?

19 A. Correct.

20 Q. Okay. Are there 80 percent kits available for an AR-15?

21 A. Yes.

22 Q. Are there 80 percent kits available for a Glock .9mm?

23 A. Yes.

24 Q. Can a felon purchase an 80 percent kit?

25 A. Yes.

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1 Q. Is a background check required to purchase an 80 percent
2 kit?

3 A. No, not at all. He can buy them in the mail.

4 Q. Okay. So tell me where you can buy a 80 percent kit from.

5 A. You go to the website and have it mailed to your home.

6 You can go to a gun show and buy it from anyone. And actually
7 some gun stores sell it. But when you buy it from an FFL, you
8 don't need a background check. You just buy it like you would
9 buy a (audio transmission gap). It's not regulated at all.

10 Q. Are you telling me you can buy an 80 percent kit from an
11 FFL?

12 A. Yes.

13 Q. Without a background check?

14 A. Yes.

15 Q. Once you get that 80 percent kit, let's say in the mail,
16 you get your 80 percent kit, you get it home. How do you make
17 a gun out of it?

18 A. Well, it has instructions. And the best thing is to go to
19 YouTube. There is hundreds of YouTube sites that show you how
20 to do it step by step, because it actually comes in a jig,
21 which is like something -- it's plastic, looks like a gun
22 frame. It's not yet a gun yet. And it comes in this jig.
23 And it tells you exactly where to drill, to put in your pins.
24 And actually it supplies a drill bit.

25 So watch YouTube, drill the holes. You might have to snip

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1 out a little bit of plastic, grind a little of the file. And
2 at that point ATF is going to say, okay, you just made a gun.

3 So when you start, it's not a gun. When you finish, let's
4 say if it's a Polymer80 Glock, once you make that bottom, the
5 frame, you have made a firearm. And then any Glock parts kits
6 or aftermarket Glock kits will fit right in and function as a
7 Glock pistol would.

8 Q. What kind of tools do you need to put the 80 percent kit
9 together?

10 A. Probably snips, the file, and an electric drill.

11 Q. Do you need a metal lathe?

12 A. No.

13 Q. So to put one of these -- to make a gun out of an
14 80 percent kit, you need a hand drill, a pair of snips, and
15 maybe a file; is that correct?

16 A. Yes. Especially for the polymer plastic, which is the
17 Polymer80S.

18 Q. And I think we talked earlier, the Glock .9mm that you
19 would purchase from a store, it's made out of polymer; is that
20 right?

21 A. Correct.

22 Q. So once somebody has assembled this 80 percent kit with
23 their hand drill, their pair of snips and their file, will it
24 operate as a firearm? Will it shoot bullets?

25 A. Yes. Shoots them automatically, just as it was -- the

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1 same as a Glock pistol would.

2 Q. Okay. And just to be clear, are there any laws
3 prohibiting the sale of one of these kits to a felon?

4 A. Not federally and not in Texas or Florida.

5 Q. Are you aware of any shootings that have involved a
6 shooter using a ghost gun to carry out the shooting?

7 A. I think there was a Saugus High School shooting in 2019
8 and five kids were shot with an 80 percent kit. One dead.
9 One wounded. A couple wounded. I remember that because I saw
10 a picture.

11 Q. We've talked about gun shows. We've talked about online
12 purchases, straw purchases, and ghost guns. You also
13 mentioned family and friends. Would you consider that another
14 way to obtain a firearm without a background check?

15 A. Yes.

16 Q. In your review of this case did it appear that
17 Devin Kelley could have had access to firearms through a
18 friend or family member?

19 MR. LeGRAND: Your Honor, we object. That's outside
20 the evidence in the case.

21 THE COURT: That's overruled.

22 BY MS. CHRISTILLES:

23 Q. Mr. Barborini, I'll ask you again. In your review of this
24 case, did it appear that Devin Kelley could have accessed
25 firearms through a friend or family member?

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1 A. Yes.

2 Q. And what was that access?

3 A. His father had guns that he shot. Also a friend. He got
4 a Maverick shotgun, which he bartered off later from someone.
5 It's not clear how he got that one, so it was from somebody.

6 Q. And you indicated that his father had firearms; is that
7 accurate?

8 A. Yes.

9 Q. How did you determine that Devin Kelley could have
10 accessed those firearms?

11 A. There was a -- the father, in a deposition, said he kept
12 his guns in a wardrobe cabinet that was made out of wood,
13 which where Devin Kelley stayed, so obviously, a wardrobe
14 cabinet, you can get in with a screwdriver. So even without
15 permission from his dad, most people would be able to get in
16 that wooden wardrobe cabinet. It's not gun safe.

17 Q. You mentioned that it's not a gun safe. Is there a
18 difference between a wardrobe cabinet and a gun safe?

19 A. Yes.

20 Q. What is that difference?

21 A. A gun safe, you'll have a metal gun cabinet. If you can't
22 afford a real gun safe, it's going to be steel. It's going to
23 have some locks that you bolt to the wall. You need a crowbar
24 (audio transmission gap) grow up to bigger gun safes, which
25 are pretty hard to get in. They have thicker metal.

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1 A wooden cabinet for wardrobe is made with clothes. I
2 know I have one at home, so you could take a screwdriver and
3 get in in a second, or one shot with a hammer.

4 Q. Now, we've talked about the possible avenues that
5 Devin Kelley could have accessed weapons from a non-FFL. I
6 want to turn and talk to you about the firearms that
7 Devin Kelley actually used in the shooting; okay?

8 A. Yes. Okay.

9 Q. And we've talked a little bit about them, but let's go
10 back to the Glock .9mm semiautomatic pistol. Is there
11 anything about this particular firearm that would have made it
12 easier or more difficult for Devin Kelley to obtain it through
13 the methods that we've discussed?

14 A. No. It could get that gun private sale, gun show, online,
15 whatever, without a background.

16 Q. And is there any characteristics or anything about this
17 weapon that would make it available through these non-FFL
18 sources that we've discussed?

19 A. It's just a Glock 19. It's available anywhere, FFLs or
20 non-FFLs.

21 Q. How about the Ruger AR-556, or an AR-15, would it have
22 been easy for Devin Kelley to obtain this weapon from a
23 non-FFL?

24 A. AR-15, not a problem at all. If he wanted that exact
25 brand, he might have had to search for a while. It just

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1 depends on how many are out there, but AR-15s are the most
2 popular guns out there.

3 Q. And I think you mentioned it a little earlier. We talked
4 about a Ruger model SR22. What is that gun generally used
5 for?

6 A. Used for plinking, because it shoots -- it's a long rifle,
7 so if you shoot, especially nowadays, even then the ammunition
8 cost of shooting a 9-millimeter Glock compared to a little 22.
9 So it's a semiautomatic, works similar to a Glock.
10 Semiautomatic. You pull the trigger. It will shoot. Except
11 the cost of shooting is probably about 89 percent less. So I
12 have the same thing. I have a 22. I shoot it more often
13 because it's cheaper to shoot so you get more trigger time for
14 training.

15 Q. And I think you used the word "plinking?" Did I hear that
16 correctly?

17 A. Plinking. So if you don't have a Glock, people use like
18 22S to shoot at cans, target shooting. It's a cheap way to
19 shoot.

20 Q. So SR22S are generally used for target practice and
21 training because the ammunition is cheaper. Is that fair to
22 say?

23 A. Yes.

24 Q. Was there any evidence that Devin Kelley used this firearm
25 during the shooting --

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1 A. Not that I recall.

2 Q. -- in your review?

3 A. No.

4 Q. Now let's talk a little bit about Devin Kelley's actual
5 purchases of firearms. And I think you alluded to it a little
6 bit. Did you have an opportunity to review information about
7 Devin Kelley's firearm purchasing history?

8 A. Yes.

9 Q. In your expert opinion did Devin Kelley demonstrate any
10 knowledge of the types of non-FFL purchases that we have
11 discussed today?

12 A. Yes. He mentioned particular gun shows, and he was
13 searching the internet for accessories. So he would
14 definitely have knowledge.

15 Q. In your review of the information, did you find any
16 evidence that Devin Kelley ever utilized any type of non-FFL
17 purchase avenues that we have discussed today?

18 A. I believe the shotgun he got from a friend. And there's
19 another firearm that he didn't like and got rid of. And I
20 think it was the SCCY, S-C-C-Y. I don't know how he got that
21 one. I think that was also from a friend, but I couldn't be
22 sure.

23 Q. You talked about buying firearm accessories online. I
24 want to talk about some of Devin Kelley's non-firearm
25 purchases. Are you familiar with accessories that can be

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1 purchased for firearms?

2 A. Yes.

3 Q. In your review of the case, was there any evidence that
4 Devin Kelley added any accessories to the firearms used in the
5 shooting?

6 A. Yes.

7 Q. In your experience, are these accessories generally sold
8 stock on the weapon, if it's purchased at a sporting goods
9 store?

10 A. No. It would have been added.

11 Q. How difficult is it to add these accessories to a firearm?

12 A. Oh, very easy.

13 Q. Now, we talked about assembling an 80 percent kit earlier.
14 If someone has the ability to add the types of accessories
15 that Devin Kelley added to his weapon --

16 MR. LeGRAND: Your Honor, we object. That calls for
17 speculation. There's no evidence that Devin Kelley had the
18 ability. That evidence has come in before the Court that
19 there's no evidence that he had the ability to manufacture
20 guns. And it's also irrelevant to the facts of this case,
21 Your Honor.

22 MS. CHRISTILLES: Your Honor, we are not asking
23 Mr. Barborini to speculate on whether Devin Kelley could have
24 assembled an 80 percent kit, or did assemble an 80 percent
25 kit, all we are asking is in his expert opinion if he could

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1 put accessories on the gun --

2 THE COURT: But that's where the assumption is.
3 There is no evidence that he actually put the accessories on.
4 I mean, some third party could have put the accessories on.
5 I'm not aware of any evidence, one way or the other. Am I
6 missing something? Did I miss part of the evidence?

7 MS. CHRISTILLES: Your Honor, I will get there then
8 and I will save this question.

9 THE COURT: So, if you will bear with me, another
10 civil case has flared up. Let me attend to that. It will
11 take all of five minutes. Why don't y'all stick around. You
12 can hear the fight, and let me just put this case to bed.

13 (Off the record discussion.)

14 (Other proceedings were held.)

15 (Off the record discussion.)

16 THE COURT: Mr. Barborini, can you hear me now?

17 THE WITNESS: Yes, I can, Your Honor.

18 THE COURT: And the feedback solution has been taken
19 care of. Okay. I apologize for that.

20 Where were we? There we are.

21 MS. CHRISTILLES: Yes, Your Honor.

22 BY MS. CHRISTILLES:

23 Q. Mr. Barborini, when we took a little break there, we were
24 talking about the accessories for firearms. Do you remember
25 that conversation?

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1 A. Yes.

2 Q. And during your review of the case were you able to look
3 at the accessories that had been added to the firearms used in
4 the shooting?

5 A. Yes.

6 Q. And I want to talk specifically about those accessories,
7 but I also want, before we get there, to talk a little bit
8 kind of about accessories in general. Are you familiar with
9 silencers?

10 A. Yes.

11 Q. Are they also called suppressors?

12 A. Yes.

13 Q. Are those regulated?

14 A. Yes. They have to be registered with ATF before you can
15 even buy one.

16 Q. So before you can even buy one, you have to go through a
17 process with ATF. Tell me about that process.

18 A. For instance, if you have a Class 3 dealer that deals in
19 national firearms act firearms, which is an FFL that has,
20 actually has special occupational taxpayer license, so if he
21 gets a silencer from, let's say, SilencerCo, which is a
22 manufacturer, it may be in the store but he can't just sell
23 you the silencers like he would a normal firearm.

24 You would fill out an ATF Form 4, which basically your
25 biographical data, photograph, fingerprints, and then \$200 as

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1 a tax for that silencer. Then it all goes up to ATF. And it
2 takes approximately six months for approval.

3 Once that's approved and the check clears, then you can go
4 back and pay for your silencer.

5 Q. Is it fair to say that the process for getting a silencer
6 or a suppressor is more difficult than getting a firearm?

7 A. Yes. And it's also registered to you. You can't just
8 sell it after that either. It's got to go through the same
9 process again, if you wanted to sell it.

10 Q. I want to show you JEX 608 which has been previously
11 admitted. So you're going to have a document pop up on the
12 screen there for you.

13 In the middle of that document.

14 This is from the Texas Rangers report. You indicated that
15 you reviewed the Texas Rangers file; correct?

16 A. Right.

17 Q. Right in the middle of the page there, it says "oil can
18 type suppressor." Do you have any clue what that is?

19 MR. LeGRAND: Your Honor, we object. There's no
20 showing that this witness reviewed this document in
21 preparation of either of his reports. In fact, the first
22 paragraph of Government 30, which is his first report, the
23 whole first paragraph is what he did review. And this
24 document is not on there.

25 MS. CHRISTILLES: Your Honor, he indicated that he

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1 reviewed the entire Texas Rangers file. This is clearly part
2 of the Texas Rangers file.

3 THE COURT: That's what I heard. That's overruled.

4 MR. LeGRAND: Your Honor, this paragraph says that he
5 reviewed certain, and he lists them from the Texas Rangers
6 file. And it's about 12 to 15 pages.

7 THE COURT: I'll let it in. That's overruled.

8 BY MS. CHRISTILLES:

9 Q. Mr. Barborini, do you know what an oil can type suppressor
10 is?

11 A. It's a vernacular of the, I guess, the back of the gun and
12 ways to get around licensed silencers. Oil can type
13 suppressor. So basically, also -- they are also called
14 solvent traps. So basically say you have a -- it could be a
15 couple different things.

16 The most common one is an oil filter like for your car,
17 like a canister spinner oil filter. That actually makes a
18 pretty good silencer for a couple shots. So what they do,
19 they sell an adapter for a thread. So you can thread this --
20 your oil filter to your firearm. Right?

21 So when you put on your firearm, these people that sell
22 the adaptors say this is for a solid trap, so when you clean
23 your gun you don't get solid on your carpet. So ATF has
24 basically said, well, it can catch solvent, which, of course,
25 is, you know, BS, because nobody screws an oil can filter on a

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1 gun.

2 But anyway, so but once you shoot it, it acts as a
3 suppresser. So once you start shooting it, then your intent
4 is you actually made a silencer, which would be illegal to
5 possess.

6 Q. That was going to be my question. Is it legal to possess
7 an oil can type suppressor? Is it legal to possess one?

8 A. The only way you can possess that legally, it's called a
9 Form 1. You would have to take that oil can and the adapter,
10 or the adapter, and you would have to apply to make your own
11 silencer.

12 So you would have to put down you as a manufacturer, the
13 same state of manufacture, the serial number. You send all
14 the information, all your biographical information, to ATF,
15 fingerprints, photographs, all of that, with a \$200 check.

16 After six months goes buy, they will say, okay, you made
17 that oil can suppressor. Now you can have it. Before you
18 make it. Otherwise, no, you can't just screw it on your gun
19 and shoot it.

20 Q. Okay. Now, I want to talk about -- I do want to turn to
21 the accessories that were added to the firearms recovered from
22 the scene of the shooting. Do you know what accessories were
23 added to the Glock .9mm?

24 A. Yes. Basically a Glock 19 has a 15-shot magazine. So
25 this one had a 31-shot -- well, a high-capacity magazine that

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1 could hold 31 rounds. But he also bought the floor plate.
2 It's called a plus-two extender. So now that magazine
3 actually holds 33 rounds.

4 And I also saw he added some grip decals. Commonly known
5 as grip tape. So it's a decal sold by the manufacturers that
6 you could stick on your Glock grip to make it, you know,
7 stickier or rougher so it doesn't slip in your hand.

8 Q. Were there accessories or aftermarket modifications to the
9 AR-556?

10 A. Yes.

11 Q. And I want to show you JEX 502-128. Oh, actually, before
12 I do that. Can I show you JEX 686?

13 A. Okay. Got it.

14 Q. All right. You talked about this extended magazine for
15 the Glock .9mm. Does this appear to be what you were
16 discussing with that extended magazine?

17 A. Yes.

18 Q. And which gun are we talking about, when we are talking
19 about the Glock .9mm, just to be clear?

20 A. The pistol pointing right at the camera.

21 Q. Okay. And what would be the part of that firearm that is
22 the extended magazine? How can you tell this has the extended
23 magazine?

24 A. Normally the stock log mags would stop at the grip, so it
25 would just be just below his pinkie finger. We can see it's

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1 an extended magazine. And plus it has a little thicker floor
2 plate. That's a plus-two extender, so it makes it, you know,
3 a 33-round magazine.

4 Q. So it's fair to say that gun pointing forward in the
5 picture in JEX 686, the metal piece extending below
6 Devin Kelley's pinkie finger is the extended magazine that you
7 are referring to?

8 A. It's actually plastic, but yes.

9 Q. Okay. I apologize.

10 All right. Now I do want to turn to the accessories added
11 to the AR-556 and I want to pull up JEX 502 at page 128.

12 A. Yes.

13 Q. And we're going to bring up that picture.

14 A. Okay.

15 Q. You indicated that you reviewed the accessories that were
16 added to the AR-556 as part of your expert opinion in this
17 case?

18 A. Yes.

19 Q. I want to walk through some of those accessories. Does
20 this picture accurately reflect some of the accessories that
21 were added to the AR-556 used in the shooting?

22 A. Yes. Yes.

23 Q. Let's start in the front. It says Taclight. What is a
24 Taclight?

25 A. It's short for tactical lights. So he's got a

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1 rail-mounted light, so he's got a little adapter to fit on
2 that rail system so he has a light so therefore he can shoot
3 when it's dark without holding a flashlight.

4 Q. Okay. How about the XTS quad rail. What is that?

5 A. That's the hand guard. That's a Picatinny rail.

6 Picatinny is -- you can see the little squares, so a Picatinny
7 rail is where you attach various accessories to include the
8 Taclight as a hook with a piece of metal, so you can hook to
9 the Picatinny rail.

10 Q. While we are looking at that rail, I'm going to do a
11 little shifting of pictures, and I'm apologize, but I want to
12 pull up -- we'll come back to this one, but I want to pull up
13 502-0039.

14 Highlight that picture.

15 A. Yes.

16 Q. We were talking about that rail. Does the rail appear to
17 be different in this picture?

18 A. Yes.

19 Q. And when we are talking about the rail, are we talking
20 about that front-most part of the firearm?

21 A. Not what's circled there, that's the vertical grip. So it
22 would be above that, so...

23 Q. Okay.

24 A. Yes. That's the hand guard, is the general term.

25 Q. And you indicated -- so this is different from the

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1 previous picture; is that correct?

2 A. Yes. The other one is a quad rail, Picatinny rail. This
3 is a polymer Magpul rail.

4 Q. What's the difference in the two?

5 A. This is polymer and it's much lighter. And instead of
6 using a Picatinny saw tooth to attach -- it's called an M-LOK
7 system. So you can attach things. It's called an M-LOK
8 system. So it's smaller and lighter than the other rail.

9 Q. I want to zoom out of that and I want to look at the date
10 on this picture.

11 Mr. Barborini, what was the date that this picture was
12 posted?

13 A. So it says October 29, 2017.

14 Q. And just to be clear, the rail in this picture was a
15 different rail than the picture that we looked at previously;
16 correct?

17 A. Definitely.

18 Q. And this rail is lighter?

19 A. Yes.

20 Q. Okay. I want to go back to JEX 502-128. All right.
21 Let's highlight that picture again.

22 All right. We've talked about the Taclight. We've talked
23 about the quad rail. What is this TRS25 red dot?

24 A. It's a Bushnell, that's the brand, red dot. So instead of
25 having -- like a normal firearm, you have a rear site and a

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1 front site, so you have to line up two things like this.

2 Well, I'm an AR-15 instructor and we were also issued this
3 ATF (audio transmission gap) a red dot type site. So instead
4 of lining up two things for faster target acquisition, you use
5 the red dot site. So once you site it in, wherever you shoot
6 at, you just point the dots. So wherever the dot it, it will
7 hit. I don't have to waste time lining up the rear and front
8 site.

9 Q. And you said this is a Bushnell brand red dot; is that
10 right?

11 A. Yes. You can sort of see the blurry brand on top of it.

12 Q. So it's not a Ruger red dot brand site?

13 A. No.

14 Q. And I think you mentioned this, but what is the purpose
15 for adding a red dot?

16 A. To make target acquisition much faster, especially it's --
17 so you see a target, whether it's moving or not, I put that
18 dot, I pull the trigger, I can go to the next target. So we
19 actually, through tactical training, we can address multiple
20 targets much faster.

21 Q. You then have the extended charging handle latch; what is
22 that?

23 A. AR-15s have charging handles and some people like to put
24 larger ones. Because if an AR-15 jams, you have to use the
25 charging handle to withdraw the (audio transmission gap) back

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1 to clear the jam. Well, sometimes you have problems because
2 it's so small you slip. So people put on large charging
3 handles so you can clear jams easier.

4 Q. So the purpose of this modification is to clear jams
5 easier?

6 A. Yes. Get the gun up and running faster.

7 Q. Okay. What is an MOE stock?

8 A. It's another Magpul. A Magpul original equipment. So
9 that's just a polymer stock made by Magpul. It's an
10 adjustable AR-15 stock. It fits AR-15 variance rifles.

11 Q. And I think you indicated, is this stock on a weapon that
12 you would buy at a sporting goods store, this accessory?

13 A. That sometimes comes as factory on that brand, on some
14 AR-15s, or you can buy them after. You can buy them
15 afterwards. They just slip on and off. It doesn't take
16 really any tools.

17 Q. Why would you change the stock on your AR-15?

18 A. A personal preference.

19 Q. And then you've got a sling. What's a — why would
20 somebody add a sling to their AR-15?

21 A. Well, it's a more of a tactical sling. You can see it's
22 attached at one side, the buttstock. The other side it has
23 attached to it the Picatinny rail.

24 And as a firearms instructor, an AR-15 firearms
25 instructor, we are trained if you are engaged in any kind of a

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1 firefight and your AR-15 goes down, that's a bungee sling, so
2 it sort of springs. You basically brush your AR-15 to the
3 side. So you sling it. You don't want to get rid of it. You
4 switch to your handgun and continue to firefight while you
5 look for cover and get your rifle up and running.

6 Q. And then you've got the CMC3.5 trigger. What's that?

7 A. Usually a stock trigger on a Ruger 556 is going to be
8 stiff. Most AR-15s are base models, so you put a drop-in
9 trigger so it has a lighter trigger pull. It basically helps
10 you shoot faster and more accurately.

11 Q. Is it easy to put in one of those new trigger pulls?

12 A. Yeah. It's not -- you have to -- basically you have to
13 knock out some pins, take out the original trigger, drop this
14 trigger in it and replace the pins.

15 Q. How about this pro mag vert grip? What is that?

16 A. Instead of grabbing, when you fire right from the
17 shoulder, instead of holding around the hand guard some
18 people's personal preference, they like to hold a vertical
19 grip. It's a personal preference for tactical shooting. Some
20 people like it. Some people don't.

21 Q. I want to zoom out and look at the date on this picture.

22 A. It says June 3rd, 2017.

23 Q. Okay. And what is the title of this post?

24 A. Rifle mods pew pew.

25 Q. So this is June 3rd, 2017. I want to go to JEX 502-0127

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1 next.

2 All right. And I want to look at this post. This says,
3 "I just put a magwell funnel on the rifle." What's a magwell
4 funnel?

5 A. A funnel is like you have, let's say, a funnel to a (audio
6 transmission gap) your car, or if you're cooking, so you don't
7 want to spill -- try to spill something into a small hole, so
8 you put a magwell funnel. So if you have to do a fast mag
9 change, sometimes you load the mag in fast and you hit the
10 side of the magwell. So this funnels your magazine in for
11 faster mag reloads.

12 Q. Okay. And just help me understand. What goes into the
13 magazine?

14 A. Well, what goes into the magazine well is the magazine.
15 The magazine holds the ammunition. In this case he had a
16 30-round, I believe a 30-round Magpul mags. So your magwell
17 is the lower receiver of AR-15, and this magwell, as it says
18 in this thing, it talks about it, it helps with the speed of
19 reloading.

20 So once you shoot a mag, you drop the mag. You want to
21 load again, you may screw up by hitting the side of the
22 magwell, but now you have a funnel. It's a bigger area. You
23 can jam that in without looking at it.

24 Q. So would it be accurate that somebody would put a magwell
25 funnel in to dramatically increase the consistency and speed

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1 of reloads?

2 A. Yes, definitely.

3 Q. I want to look at -- let's look one more time at 502-0039.

4 Let's look at that picture again.

5 A. Okay.

6 Q. Besides that lighter rail, is there anything else
7 different about the accessories in this picture as opposed to
8 the ones we were looking at from the June 2017 picture?

9 A. In this one there is no magwell on -- what do you call it?
10 There is no mag funnel. And now I can clearly see a BAD
11 lever, a B-A-D lever, on it, which is right in front of the
12 trigger inside the trigger guard.

13 Q. What is a BAD lever?

14 A. BAD lever is made by MagPole, a battery assist device
15 basically. Our AR-15 type rifles, let's say you shoot your
16 AR-15s and a mag runs out. Well, the bullet stays open, so
17 then you would dump your magazine by pressing the magazine
18 release on the right side of the gun. The bolt is open, so
19 you put in your new mag, and now the bolt closes on the left
20 side.

21 So what the mag, the BAD lever does, you attach it just
22 with a screw, and now if you looked up at a trigger, instead
23 of taking my hand off the rifle and smacking the bolt closed,
24 I can just use my trigger finger and lift it up and it will do
25 the same thing. So it increases. You don't have to change

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1 hands. Or you can hit it on the left or you can use the
2 right.

3 Q. So what's the purpose of having a BAD lever?

4 A. A couple of reasons. Number one, you don't have to move
5 your hands so you have more speed. You don't have to move
6 your hand to close that bolt. You keep it on -- you keep it
7 in the trigger guard, which you want to start shooting again.

8 And now it's ambidextrous. I can shoot -- I can close
9 with either hand basically. But now it allows my finger
10 trigger to also shut the bolt, get it up and running in faster
11 speed, and then I can start shooting again.

12 Q. And you said you didn't see the magwell funnel in this
13 picture?

14 A. No.

15 Q. Would having the BAD lever help with increased speed of
16 reloads?

17 A. Yes. Yes, because you don't have to take your hand off
18 the gun. You just use the -- especially if you practice. You
19 become much faster because if you just push your finger up and
20 it shuts the bolt.

21 Q. Mr. Barborini, I'm going to pose a hypothetical for you.
22 Based on your experience, if someone were to add accessories
23 to a weapon, like the accessories that we have seen here. If
24 they had the ability to add those accessories, would they have
25 the ability to assemble an 80 percent kit?

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1 MR. LeGRAND: Your Honor, we object. That's an
2 attempt to circumvent this Court's ruling, first of all. And
3 it's assumption not in evidence.

4 MS. CHRISTILLES: Your Honor, I'm posing a
5 hypothetical to the expert witness, and Your Honor was
6 concerned that we didn't have any evidence that Devin Kelley
7 actually added these accessories, yet we just presented a
8 joint exhibit that at least circumstantially it could be
9 inferred that he added them when he talks about adding the
10 magwell funnel.

11 THE COURT: That's overruled. You can continue.

12 BY MS. CHRISTILLES:

13 Q. Mr. Barborini, just to make sure you heard my question:
14 If somebody hypothetically had the requisite ability to add
15 the accessories that we've seen on this weapon to the AR-15,
16 would they have the ability to assemble an 80 percent kit?

17 A. Yes. And especially the Polymer80 type kits, which is the
18 most common polymer.

19 Q. I want to show you JEX 583-0011.

20 MS. CHRISTILLES: If I may have a moment, Your Honor.

21 No 11. Not 111.

22 There we go. If you could blow that up for me.

23 BY MS. CHRISTILLES:

24 Q. Mr. Barborini, we've kind of talked about those
25 accessories. You see some weights here. Are those weights

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1 that seem consistent with the accessories that we've looked
2 at?

3 A. Yes, except the grip. I mean, I don't know if that's the
4 brand grip, but you have the quick detach sling. You have the
5 light. You have the vertical foregrip. And then you have the
6 MOE hand guard, which is the Magpul. That's the, I guess the
7 final one he had, the polymer handgun we discussed, which
8 means Magpul original equipment hand guard. So that's a light
9 handgun. He even has 6.8 ounces, which is lighter than the
10 original one, which is made out of an aluminum and has all its
11 teeth on it.

12 Q. So that MOE hand guard would have been for the Glock .9mm?

13 A. No, that's for the AR-15.

14 Q. I apologize. So this would have all been the AR-15
15 accessories that were added to the firearm?

16 A. Yes.

17 Q. What would, in your professional experience, what would be
18 the purpose of weighing the parts on your gun?

19 A. Well, if you're going to move and shoot, you want the gun
20 to be lighter. I mean, we actually make fun. Some people
21 that don't know, they put so many heavy things on their AR-15
22 they can't even lift them. So the lighter I can make it, the
23 faster I can get it up, get it on my shoulder, and, you know,
24 move and shoot.

25 Q. Mr. Barborini, in your expert opinion what is the

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1 significance of these accessories that were added to the
2 AR-556 used in this shooting?

3 A. Tactically, you have everything from the start of the red
4 dot which makes much quicker target acquisition than having
5 sites. And you see actually there is also back-up sites on
6 there, so that one actually has a pop-up back-up site. It's
7 called the back-up iron sites.

8 And then you have the BAD lever. So that helps get it up
9 and running, if you have a jam, or just to change mags. You
10 have that for more speed.

11 You have the charging handles, the extended charging
12 handle. Again, if you have a jab, or if you want to instead
13 of using your bolt close, you could actually sling shot that
14 charging handle and that could grip it.

15 You have the magwell, which makes it faster again. When
16 I'm doing speed, I don't want to jam the side of my gun. Now
17 I can funnel that magazine right away get this thing up and
18 running with a fresh mag.

19 And then you've got the magwell MOE hand guard. So the
20 Picatinny hand guard is much lighter. And then you have the
21 BAD lever, so now I can -- never have to take my finger out of
22 the trigger guard when I need to close that bolt. I just can
23 put my trigger finger up. So I mean, basically faster
24 shooting, multiple targets, easier, lighter, and faster target
25 access.

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1 MS. CHRISTILLES: Pass the witness, Your Honor.

2 THE COURT: Will there be cross?

3 MR. LeGRAND: Yes, Your Honor.

4 THE COURT: Do you want to take a lunch break now or
5 come back, or --

6 MR. LeGRAND: Your call.

7 THE COURT: How much time do you think you need?

8 MR. LeGRAND: Oh, roughly an hour. I'm usually not
9 very long.

10 THE COURT: Let's go ahead and take a break now then.

11 Mr. Barborini, we're going to take our lunch break
12 now. If you will be back on no later than 1:20, central. I'm
13 assuming you are in Florida.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Yeah. So 1:20 central. 2:20 your time.

16 THE WITNESS: Thank you.

17 (Recess.)

18

19

20

21

22

23

24

25

1 *(Change in reporter)*

2 *(Open court)*

3 THE COURT: Thank you. Please be seated.

4 Your cross.

5 MR. LEGRAND: May I proceed, Your Honor?

6 THE COURT: Yes.

7 MR. LEGRAND: Thank you.

8 CROSS-EXAMINATION

9 BY MR. LEGRAND:

10 Q. Mr. Barborini -- did I pronounce that correctly?

11 A. Yes.

12 Q. My name is George LeGrand, and I'm one of the plaintiffs'
13 lawyers in this case. We've never met before. I don't
14 remember. Do you recall?

15 A. I do not.

16 Q. Okay.

17 A. I don't think we have met.

18 Q. I have a few questions for you today. Hope you'll bear
19 with me. I'll try not to take too long.

20 If I ask a question you don't understand, would you please
21 stop me and ask me to rephrase it or reask it?

22 A. Yes, sir.

23 Q. Okay. If you don't stop me, I'm going to presume that you
24 at least thought you understood the question. Okay?

25 A. Okay.

1 Q. How long -- if we add all the years up that you've been in
2 law enforcement, how would it -- how many would it be?

3 A. 19 -- I was sworn in -- I got hired '77, sworn in in '78,
4 to 2021.

5 Q. And --

6 A. You can do the math.

7 Q. In your career, have you testified more than once?

8 A. Yes.

9 Q. Okay. How many times have you testified?

10 A. I really don't know.

11 Q. Can you offer us a guess?

12 A. I'd say, in federal court, it's well over 100 times I've
13 testified as far as firearms-related matters.

14 Q. And that's just in federal court?

15 A. Well, federal and state court.

16 Q. Has that always been for a governmental entity?

17 A. You were broken up. Say that again.

18 Q. That's always been -- has all of your testimony that
19 you've ever given been for the government?

20 A. Other than civil cases.

21 Q. How many civil cases?

22 A. I worked on two civil cases.

23 Q. Okay. And when were they?

24 A. One was probably five years ago or six years ago, and one
25 was about three years ago.

1 Q. When you worked on civil cases, did you ever testify
2 against the government?

3 A. No.

4 Q. Would you?

5 A. Would I? Yeah. I testify to the truth.

6 Q. Would you testify against the government?

7 A. If the government was wrong, yes.

8 Q. Okay. You know the facts of this case; correct?

9 A. Basic facts, yes.

10 Q. Okay. Was the Air Force wrong?

11 A. The Air Force was --

12 MS. CHRISTILLES: Objection, Your Honor. Outside the
13 scope of direct examination. Speculation.

14 MR. LEGRAND: Your Honor, may I respond?

15 THE COURT: Yeah.

16 MR. LEGRAND: This witness has been directly
17 designated as an expert witness concerning these alternative
18 markets. Well, his opinion and his report -- both of his
19 reports, both his primary report and his supplemental report,
20 deal with a two-prong test.

21 First is that Mr. Kelley gets rejected in a firearms sale.
22 And then after that happens, we go to this other alternative
23 market part of his opinion.

24 So this part of my questioning is about the first prong,
25 and that is the Air Force.

1 THE COURT: That's overruled.

2 You can continue.

3 MR. LEGRAND: Thank you, Your Honor.

4 BY MR. LEGRAND:

5 Q. So did you understand my question, Mr. Barborini?

6 A. Yes.

7 Q. What's your answer?

8 A. Somebody in an arm of the military failed to send in an
9 R-84, which would be transmitted to the criminal justice
10 records. So that would -- that would be a mistake.

11 Q. Okay. Are you here to defend that conduct?

12 A. No. I'm here to testify about what I -- what I just
13 testified to; firearms and firearms-related matters.

14 Q. So in the past some 30-odd years that you've worked in law
15 enforcement, have you worked on gun-related cases where you
16 were trying to -- for example, how many years did you spend
17 where you were trying to arrest people for violating gun laws?

18 A. Well, I investigated gun laws for 25 years, and now I
19 assist in those investigations.

20 Q. And your reports talk about a lot -- many pages of arrests
21 that you've made for felons; correct? Committing felonies
22 related to guns; correct?

23 A. I don't think it has a number of arrests. But, yes, I
24 investigated felons who had firearms, correct.

25 Q. Have you been responsible in your career for felons

1 populating or being put into the NICS database?

2 A. Oh, when I make the arrest -- yes, I make the arrest, and
3 the fingerprints are sent in by my agency, whatever agency I
4 work for, yes.

5 Q. Okay. Are you aware of any instance where you were
6 involved in the prosecution of a felony where the fingerprints
7 of that -- well, where the person was convicted? Let's start
8 there.

9 A. Person was convicted, yes.

10 Q. Okay. Are you aware of any -- how many of those cases
11 have you worked on in 30 years where a felon was convicted?

12 A. Probably hundreds of those cases.

13 Q. Hundreds?

14 MS. CHRISTILLES: Objection, Your Honor. I think
15 that question's a little vague, "felons." How many cases have
16 you worked on where felons were convicted?

17 BY MR. LEGRAND:

18 Q. Okay. How many cases have you worked on where felons were
19 convicted in gun crimes?

20 A. Probably hundreds of cases, state and federal.

21 Q. Okay. And are you aware of any single case you've ever
22 worked for -- either in the police departments you worked for
23 or your 25 years at the ATF, or any of your Palm Beach County
24 work that you've done recently, are you aware of any felony
25 prosecution resulting in a conviction that was not put into

1 the NICS database?

2 A. I'm not aware of any of those.

3 Q. Okay. So they were all put into the NICS database;
4 correct?

5 A. I would assume so.

6 MS. CHRISTILLES: Objection.

7 MR. LEGRAND: Would you be --

8 MS. CHRISTILLES: Speculation.

9 THE COURT: He's already answered.

10 BY MR. LEGRAND:

11 Q. Would you be critical if any of your felony prosecutions
12 that you were involved in that resulted in a conviction were
13 not populated into the NICS database?

14 MS. CHRISTILLES: Objection, Your Honor. Relevance.

15 THE COURT: That's overruled.

16 THE WITNESS: Yes.

17 BY MR. LEGRAND:

18 Q. And why would you be critical of that?

19 A. Because he's convicted by a court of law, and it is
20 supposed to go to his -- to CJIS.

21 Q. Mr. Kelley was convicted of cracking his son's skull;
22 correct?

23 A. I'm not sure. He was convicted of -- in the military.
24 I'm not sure about cracking his son's skull. But yes.

25 Q. Was he convicted of a domestic violence felony --

1 A. Yes.

2 Q. -- that resulted in the fact that he should have been
3 denied any purchase of a firearm after that; correct?

4 A. Yes.

5 Q. And the Air Force should have submitted that to the FBI;
6 correct?

7 A. That is correct.

8 Q. And you're critical of them not doing that; correct?

9 A. Yes.

10 Q. And if they had submitted Mr. Kelley's criminal background
11 history to the FBI, do you agree Mr. Kelley would not have
12 been allowed to buy the AR-556 that he committed all of the
13 horrendous acts that he committed at the Sutherland Springs
14 Baptist Church?

15 A. Well --

16 MS. CHRISTILLES: Objection, Your Honor. That calls
17 for speculation.

18 THE COURT: That's overruled.

19 BY MR. LEGRAND:

20 Q. You can answer --

21 A. Yes, sir.

22 Q. -- Mr. Barborini.

23 A. That gun from that gun dealer, correct.

24 Q. Thank you.

25 So you agree he would not -- I'll go on to another

1 question.

2 You agree that your job for 30-some-odd years has been to
3 get criminals off the streets; correct?

4 A. Correct.

5 Q. And your job has been to make sure they get into the NICS
6 database; correct?

7 A. Yes.

8 Q. And do you agree that your job as a law enforcement
9 officer depends, in many respects, on felony convictions
10 getting into the FBI databases; correct?

11 A. Correct.

12 Q. Do you agree that you depend every day in your job on
13 the -- on the FBI databases having been properly populated
14 with felony convictions?

15 A. Most -- well, not every case. But yes.

16 Q. Do you agree that if someone is not put into the FBI
17 database when they've committed a domestic violence felony,
18 that it hinders your job as a law enforcement officer?

19 A. Yes.

20 Q. Now, Mr. Barborini, I'm going to go just for a moment --
21 if you'll bear with me, I need to go back through a few things
22 that the government went through with you, and then I'm going
23 to go back to some different subjects. Okay?

24 A. Okay.

25 Q. But, first of all, you reviewed -- or counsel put up on

1 the screen a Texas Ranger document.

2 Do you recall that?

3 A. Yes.

4 Q. Did you review that document before today?

5 A. Yes.

6 Q. When?

7 A. I don't know. But I've seen it before about the (audio
8 transmission gap).

9 Q. Okay. I've got your report -- your first report.

10 In fact, your second report only makes reference to you
11 reviewing some deposition testimony; correct?

12 A. Correct.

13 Q. Okay. And your first report talks about what documents
14 you've reviewed; correct?

15 A. Correct.

16 Q. And you recall -- and I think I've counted them -- it
17 mentions some 13 Texas Ranger documents?

18 A. I guess, what the report says, correct.

19 Q. Are you aware that the Texas Rangers file consists of some
20 70,000 documents?

21 A. No.

22 Q. So you -- did you review what the government sent you to
23 review?

24 A. I reviewed those documents, and I recall seeing that
25 document before. But there is a lot of documents.

1 Q. Did the government send you the 70,000 documents from the
2 Texas Ranger file or just these specific 13?

3 A. I --

4 Q. I guess we can say 14 today.

5 A. I am not sure exactly. I reviewed those documents. I do
6 not know if there were 70,000, sir.

7 Q. Okay. Well, I guess what I'm asking you is, in your
8 report, you only list 13.

9 A. Okay.

10 Q. So did you know there were 70,000?

11 That's really what I'm trying to get to.

12 A. I can't answer a question I don't know, sir. That's all I
13 can tell you.

14 Q. Wouldn't you remember if you reviewed 70,000 documents?

15 A. No, I would not.

16 MS. CHRISTILLES: Your Honor, this is asked and
17 answered.

18 BY MR. LEGRAND:

19 Q. You wouldn't?

20 A. No.

21 THE COURT: One second. So now it's been asked and
22 answered. I am surprised that he wouldn't recall reviewing
23 70,000 pages of stuff, but he's given an answer.

24 MR. LEGRAND: Thank you, sir.
25

1 BY MR. LEGRAND:

2 Q. In your review of the various documents the government
3 gave you to review in this case, one of the documents you do
4 list on your report is ATF Firearm Report 12797, which is
5 JEX 423.

6 Do you recall reviewing that, the ATF report in this case?

7 A. Yes.

8 Q. Okay. Did you find anywhere in the ATF report that they
9 discussed the existence of alternative markets that might have
10 been available to Devin Kelley for firearms?

11 A. No.

12 Q. Okay. In reviewing the Texas Rangers file, the some
13 70,000 documents that you don't recall, or in reviewing the
14 FBI file -- did you review the FBI file?

15 A. Yes.

16 Q. Okay. Did you see anything in the FBI file or the Texas
17 Ranger file that said anything about the availability of
18 alternative gun markets to Devin Kelley?

19 A. Do not recall seeing that.

20 Q. You didn't see it, did you?

21 A. No.

22 Q. As far as you know, it's not there, is it?

23 A. I do not remember seeing that document referring to that
24 subject.

25 Q. Okay. You went through with counsel the secondary

1 markets. Let me see if I wrote this down correctly. We'll
2 start with gun shows.

3 A. Yes.

4 Q. Are you aware of any evidence in this case that Devin
5 Kelley ever purchased a firearm at a gun show?

6 A. No.

7 Q. Okay. Are you aware of any evidence in this case that
8 Devin Kelley purchased a firearm from the internet?

9 A. No.

10 Q. Do you know whether or not -- in fact, do you believe that
11 the Texas Rangers turned over every stone trying to find
12 anything in this case about Devin Kelley?

13 MS. CHRISTILLES: Objection. Speculation.

14 THE COURT: That's sustained.

15 BY MR. LEGRAND:

16 Q. Do you know how extensive the Texas Ranger investigation
17 was?

18 A. I assume they're pretty good. I just don't -- I'm not
19 familiar with them.

20 Q. Did you find anything whatsoever to suggest that Devin
21 Kelley had a log-in for Armslist or Texas Gun Trader?

22 A. No.

23 Q. Did you find any evidence whatsoever that Devin Kelley
24 ever went to any of those websites?

25 A. No.

1 Q. So all of your conversation with counsel about that was
2 zero evidence, just conversation? You have no evidence of it?

3 A. No. The conversation was -- referenced how else to get a
4 gun -- that's what my testimony was about -- besides a dealer.

5 Q. Well, let's talk about whether Devin Kelley ever went to
6 those places.

7 Do you have any evidence of that?

8 A. No.

9 Q. Okay. That's what I meant by it being conversation.

10 In other words, the markets exist, is what you're saying?

11 A. Yes.

12 Q. Straw purchase? Do you have any evidence that Mr. Kelley
13 ever was involved in a straw purchase?

14 A. No.

15 Q. Do you have any evidence that Mr. Kelley ever used any of
16 his father's firearms?

17 A. He did shoot his father's firearms.

18 Q. You have evidence that he shot his father's firearms?

19 A. Depositions -- shooting at his father's place.

20 MR. LEGRAND: Okay. Could we pull up Michael
21 Kelley's deposition, Volume I, page 42.

22 *(Playing video)*

23 BY MR. LEGRAND:

24 Q. Okay. Does that refresh your recollection of that
25 testimony?

1 A. There's something about a .380 Walther, I sort of
2 remember, that Devin had access to.

3 Q. And you mentioned Mr. Kelley's guns and where they were
4 kept in a cabinet; correct?

5 A. Correct.

6 Q. You didn't mention the fact that Mr. Kelley used trigger
7 locks.

8 What are trigger locks?

9 A. A trigger lock is either a -- could be a -- looks like a
10 hasp lock with a cable on it, or a trigger lock that fills in
11 the trigger guard to prevent someone from pulling the trigger
12 or -- it depends on where you put the lock -- or accessing the
13 chamber to load it.

14 Q. Are they reliable?

15 A. Well, if it's the cable -- the trigger locks/cable locks
16 can be defeated with snips or a hacksaw.

17 Q. Do you own any trigger locks?

18 A. Yes.

19 Q. So you make use of them yourself?

20 A. No. I keep my guns in a safe.

21 Q. Have you ever used trigger locks?

22 A. No.

23 Q. Do you know whether or not Michael Kelley used trigger
24 locks?

25 A. I do not know.

1 Q. Okay. You didn't mention it in your reports; correct?

2 A. Correct.

3 Q. You did read his deposition, though.

4 Are you aware that he said in his deposition that he used
5 trigger locks?

6 A. He may have.

7 Q. Okay. Now, next, you talked about this 80 percent gun?

8 A. Yes.

9 Q. In this case, have you seen any evidence whatsoever that
10 Devin Kelley ever purchased or possessed an 80 percent gun?

11 A. No.

12 Q. Have you seen any evidence whatsoever that he ever built a
13 gun out of an 80 percent gun?

14 A. No.

15 Q. The newspaper? Have you seen any evidence that Mr. Kelley
16 ever -- Devin Kelley ever purchased a firearm from a
17 newspaper?

18 A. No.

19 Q. How about from friends?

20 A. Oh, Danielle, in her deposition, said that he got a gun
21 from a friend and he hated it. So he got rid of it and got
22 the Glock.

23 Q. And ghost guns? Any evidence that Mr. Kelley ever had a
24 ghost gun?

25 A. No.

1 Q. Do you know whether or not Devin Kelley ever attended any
2 gun shows?

3 A. No.

4 Q. Did the government give you any evidence in that regard
5 concerning Devin Kelley going to gun shows?

6 A. No. I don't believe so.

7 Q. Okay. Now, you mentioned -- in your conversations with
8 counsel, you also mentioned that sometimes FFLs call you to
9 complain.

10 Do you recall that?

11 A. Correct.

12 Q. Okay. Do you know if any FFLs in this case ever contacted
13 or were in touch with a law enforcement concerning Devin
14 Kelley?

15 A. No.

16 Q. Have you been provided any evidence that discusses whether
17 or not an FFL ever contacted law enforcement with reference to
18 Devin Kelley?

19 A. No.

20 MR. LEGRAND: Can we look at JEX 22-585.

21 Can you blow up paragraph 4 for me.

22 BY MR. LEGRAND:

23 Q. Have you ever reviewed -- this is the top half of
24 paragraph 4.

25 Have you seen this document before?

1 A. No, I --

2 Q. You have?

3 A. I don't know.

4 Q. You understand it talks about Mr. Kelley and "If the cops
5 show up at my door, I'll shoot them," and "My work is so lucky
6 I do not have a shotgun because I would go in there and shoot
7 everyone"?

8 MS. CHRISTILLES: Objection, Your Honor.

9 THE COURT: One second.

10 Go ahead.

11 MS. CHRISTILLES: Objection. Relevance.

12 I think the question was if an FFL ever called the cops on
13 Mr. Kelley, and then we transitioned into this document. And
14 I'm not sure how this document is at all relevant to
15 Mr. Barborini's expert testimony on firearms.

16 MR. LEGRAND: Your Honor, I'm going to show that here
17 in the next question.

18 THE COURT: Yeah. Tie it in.

19 MR. LEGRAND: Can we go to the next paragraph,
20 straight down, that begins with "on June" -- "on 7 June."

21 Can you highlight that paragraph for me, the first three
22 lines. Thank you.

23 BY MR. LEGRAND:

24 Q. Have you reviewed this paragraph of JEX 22 before,
25 Mr. Barborini?

1 A. I recall the DB9, yes.

2 Q. Okay. Are you aware that the Holloman Air Force Base base
3 exchange is also a firearm FFL?

4 A. Yes.

5 Q. And are you aware that at least two of the firearms that
6 Mr. Kelley owned or purchased were purchased at the Holloman
7 Air Force Base exchange?

8 A. Yes.

9 Q. Now, reading the first line of this paragraph, do you see
10 where it says "on 7 June --"

11 A. "The BX," yes.

12 Q. -- "of 2012"?

13 A. Yes.

14 Q. Do you know what was going on that day in Devin Kelley's
15 life?

16 MS. CHRISTILLES: Objection, Your Honor. Outside the
17 scope of direct. Relevance.

18 THE COURT: That's overruled.

19 BY MR. LEGRAND:

20 Q. Okay.

21 A. I don't recall --

22 Q. If you look down -- if you look down further in the
23 paragraph, Mr. Barborini, do you see that that is the same day
24 he escaped from the Peak mental health facility?

25 A. Yes. I'm reading that now. Yes, sir.

1 Q. Okay. And are you aware that on the very same day, the
2 Holloman Air Force Base, New Mexico, base exchange notified
3 the Air Force Office of Special Investigations, the Det 225
4 that "The subject" -- that would be referring to Devin Kelley;
5 correct?

6 A. Yes.

7 Q. "The subject called and placed an order around
8 1400 hours" -- that would be 2:00 in the afternoon; correct?

9 A. Yes.

10 Q. -- "on 7 June of 2012 for a Diamondback DB9, semiautomatic
11 9-millimeter handgun."

12 What is that, Mr. Barborini?

13 A. A DB9 is a semiautomatic pistol made in Daytona Beach,
14 Florida -- actually in Daytona, Florida -- Cocoa, Florida.
15 Excuse me. DB9 is a polymer semiautomatic handgun.

16 Q. Are you aware, Mr. Barborini, that on February 12th of
17 2012, Mr. Kelley bought an EAA W .38-caliber revolver at the
18 Holloman BX?

19 A. Yes.

20 Q. Okay.

21 THE COURT: What was that date again?

22 MR. LEGRAND: February 12th of 2012.

23 THE COURT: Thank you.

24 BY MR. LEGRAND:

25 Q. And are you aware, Mr. Barborini, that on April the 12th

1 of 2012, Mr. Kelley bought a SIG Sauer P250 at the Holloman
2 Air Force Base base exchange?

3 A. Yes.

4 Q. Did anyone in this case tell you that the 49th Security
5 Forces at Holloman Air Force Base had caused -- somewhere in
6 this time period had caused Mr. Kelley to give up his
7 EAA W .38 revolver?

8 A. No.

9 Q. Did the government ever tell you that that gun was in the
10 armory because the 49th Security Forces had ordered Mr. Kelley
11 to turn it over?

12 A. No.

13 Q. And does it appear here, then, that then he returned -- in
14 other words, after he was told to turn over his gun and put it
15 in the armory, where did he go next to buy a firearm? Another
16 FFL?

17 MS. CHRISTILLES: Your Honor, I'm going to object to
18 relevance and outside the scope of direct.

19 THE COURT: That's overruled.

20 BY MR. LEGRAND:

21 Q. Did he return to Holloman Air Force Base to purchase the
22 SIG Sauer P250?

23 A. The SIG Sauer, he already bought.

24 And then he went to the DB9; is that what you're saying?

25 Q. No. I'm saying they told him to turn in the

1 .38 revolver --

2 A. Okay.

3 Q. -- and then, after that, he bought the SIG Sauer P250 at
4 Holloman Air Force Base base exchange?

5 A. Yes. Yes.

6 Q. Okay. And so when confronted with giving his weapon up to
7 the -- to the Security Forces at the 49th, his -- what he
8 resorted to doing was returning to an FFL; correct?

9 A. Correct.

10 Q. In fact, the same one he had gone to before, on the BX?

11 A. Yes.

12 Q. Okay. And then as you and I talked a few minutes ago, on
13 the document that's JEX 22, apparently, on June the 9th -- on
14 June the 7th, Holloman Air Force Base base exchange called the
15 Office of Special Investigations and told them that Mr. Kelley
16 had ordered a firearm?

17 A. Yes.

18 Q. Why would an FFL call the law enforcement officers and
19 tell them that this man has ordered a firearm?

20 MS. CHRISTILLES: Objection. Speculation.

21 THE COURT: That's sustained.

22 BY MR. LEGRAND:

23 Q. Well, is it a fact they did apparently call the Office of
24 Special Investigations and tell them that Mr. Kelley had
25 ordered a firearm?

1 A. Yes.

2 Q. Okay. So does it appear from this document that, for some
3 reason, the BX called the Office of Special Investigations
4 about Mr. Kelley?

5 A. Yes.

6 Q. Do you know how the BX learned or came into the
7 understanding that they should call the Office of Special
8 Investigations if Mr. Kelley orders a firearm?

9 MS. CHRISTILLES: Objection. Personal knowledge.

10 THE COURT: Yeah, he needs to -- that's what the
11 question's asking him, does he know?

12 That's overruled so far. Let's wait for the response.

13 BY MR. LEGRAND:

14 Q. Well, do you know how they came into that knowledge?

15 A. No.

16 Q. We do know, do we not, sir, that no other FFLs in the
17 country came into any knowledge about Devin Kelley; correct?

18 A. That I know of, correct.

19 Q. Okay. So, apparently, the BX at Holloman somehow came
20 into some information about Mr. Kelley; correct?

21 A. Yes.

22 Q. But would it appear -- well, you know -- you know for a
23 fact that the security forces at Holloman Air Force Base
24 didn't share that information with the FBI, did they, that
25 there was a problem with Devin Kelley?

1 A. No.

2 Q. Okay. They should have, shouldn't they?

3 You and I have already discussed that.

4 A. The FBI -- when you say "FBI," you're talking about the
5 records?

6 Q. The FBI should have known about Devin Kelley's conviction?

7 A. If you're talking about CJIS records, correct.

8 Q. Okay. Now, next on my list, in December of 2014, am I
9 correct that's when Mr. Kelley bought the Glock 19 from
10 Specialty Sports?

11 A. Okay.

12 Q. Is that correct?

13 A. Yes.

14 Q. Okay. And is Specialty Sports an FFL?

15 A. Yes.

16 Q. Okay. And then June 26th of 2015, did Mr. Kelley buy a
17 .357 pistol or handgun from Specialty Sports --

18 A. Yes.

19 Q. -- in Colorado?

20 A. Yes.

21 Q. Are they an FFL?

22 A. Yes.

23 Q. On April the 7th of 2016, did Mr. Kelley buy that
24 Ruger AR-556 that he sprayed the church at Sutherland Springs
25 with?

1 A. Yes.

2 Q. Did he buy it from an FFL?

3 A. Yes.

4 Q. Did the government make you aware that a few months before
5 that, he had gone to Dick's Sporting Goods in New Braunfels
6 and tried to buy a weapon like that?

7 A. I don't believe so.

8 Q. Okay. Has the government made you aware that Dick's
9 Sporting Goods rejected Mr. Kelley?

10 A. There's one dealer that rejected him due to a magazine
11 being with the gun, but that was the same one he got it from.
12 I don't recall the other one.

13 Q. My question -- I'll repeat it for you.

14 My question is, did the government ever make you aware
15 that there's evidence that Dick's Sporting Goods rejected
16 Mr. Kelley in an attempt to purchase a firearm?

17 A. I don't -- I don't believe so.

18 Q. Okay. Assuming that they did, would it appear that
19 Mr. Kelley then again returned to another FFL?

20 A. Yes.

21 Q. Okay. He didn't go to any of these alternative markets
22 that you've talked about; correct?

23 A. For that gun, you are correct.

24 Q. In other words, when they took his gun away from him at
25 Holloman, he went back to an FFL, correct, to get another one?

1 A. Correct.

2 Q. Okay. When he escaped from Peak mental hospital, he tried
3 to get a gun from where? Another FFL; correct?

4 A. Yes.

5 Q. Okay. And, in fact, that FFL called security forces;
6 correct?

7 A. Yes.

8 Q. And then when he tried to buy a firearm at Dick's Sporting
9 Goods and was rejected, he returned to an FFL; correct?

10 A. Yes.

11 Q. He never went to any of these alternative markets that
12 you've testified about today; correct?

13 A. That I know of, correct.

14 Q. Now, am I correct that because of the Air Force and their
15 failure to report Mr. Kelley to the FBI, that the entire gun
16 market was available to Mr. Kelley?

17 A. From an FFL, correct.

18 Q. Okay. He could go anywhere he wanted to buy a firearm;
19 correct?

20 A. Yes. In certain -- in those states, correct. In -- state
21 and Colorado for long guns, correct.

22 Q. And do you have any evidence that other than this handgun
23 you mentioned and the shotgun that he didn't like, that he
24 ever went anywhere but an FFL?

25 A. No.

1 Q. That's the choice he made; correct?

2 A. Correct.

3 Q. Do you know why he made that choice?

4 A. I have no idea.

5 Q. Okay. You've talked about the fact that new weapons are
6 available at gun shows; correct?

7 A. You were broken up, sir. Try one more time.

8 Q. You testified today that new guns are available at gun
9 shows; correct?

10 A. Yes. Yes.

11 Q. Okay. Any evidence that Mr. Kelley ever took advantage of
12 that?

13 A. No.

14 Q. Any evidence that Mr. Kelley ever went anywhere to get
15 this Ruger AR-556 except a FFL?

16 A. No.

17 Q. He could have gone to his father? His father had an --
18 had an AR; correct?

19 A. Correct.

20 Q. In fact, he went with his father to Cabela's to buy that
21 firearm.

22 Did you understand that?

23 A. I don't recall that. Could have happened, but I don't
24 recall.

25 Q. So if one of these straw purchases you've talked about

1 were going to take place, that would have been an opportunity,
2 wouldn't it, when he and his father went to Cabela's and his
3 father bought an AR rifle?

4 A. Yes, could have.

5 Q. Okay. Do you have any evidence that Mr. Kelley bought
6 that gun for Devin?

7 A. No.

8 Q. Okay. So Devin didn't seize on that opportunity to go
9 through a straw sale, did he?

10 A. Correct.

11 Q. And the other choice he could have made, that you've
12 talked about, is Armslist or Texas Gun Traders.

13 We've gone through that, haven't we?

14 A. Yes, we have.

15 Q. Now, I want to go -- counsel talked about silencers and an
16 oil can silencer.

17 Do you know why she brought that up?

18 A. No.

19 Q. Okay. Any evidence that Mr. Kelley ever used a silencer
20 at Sutherland Springs?

21 A. No.

22 Q. These oil can silencers, could you fire 500 shots through
23 one of them?

24 A. Yes.

25 Q. Could?

1 Do you have any evidence that he used one to shoot all
2 these folks?

3 A. No.

4 Q. Okay. So you have no idea why she brought that up?

5 A. It was -- it was in an email.

6 Q. No, no. I'm talking about counsel for the government.

7 Do you know why she brought up the oil can silencer?

8 A. No.

9 Q. Do you know why she brought up all these alternative
10 markets?

11 A. Well, the oil can silencer, it's a way to get around the
12 law of -- a silencer law. And he stated it in an email, so
13 that's probably why she brought it up.

14 Q. The oil can silencer would have been illegal, correct, for
15 Devin Kelley?

16 A. Well, again, once he shoots it, yes. Once he intends to
17 use it as a silencer, correct.

18 Q. But that -- even if he had an oil can silencer or even if
19 he intended to use one, that oil can silencer wasn't any more
20 illegal than the three firearms he had with him at Sutherland
21 Springs, were they? They were just as illegal, weren't they?

22 A. The oil can silencer, when you buy it, it's a solvent
23 trap. So it's not illegal for anyone to have until you shoot
24 it. And then, okay, it's a silencer.

25 Q. So until he put it on a gun and used it as a silencer,

1 there's nothing wrong with having that?

2 A. That's correct.

3 Q. But the three firearms that he had with him at Sutherland
4 Springs, they were definitely -- definitely illegal; correct?

5 A. For him to possess, correct.

6 Q. Now, you and I have talked about -- and I don't want to
7 spend any length of time on this, really.

8 But you and I have talked about the fact you're critical
9 of the Air Force for not reporting Devin Kelley; correct?

10 A. Well, someone that -- yes.

11 Q. Do you agree that the Air Force failure to report was a
12 substantial factor in Devin Kelley being able to purchase the
13 AR-556 that he used at Sutherland Springs?

14 MS. CHRISTILLES: Objection.

15 THE COURT: One second.

16 MS. CHRISTILLES: That calls for a legal conclusion.

17 THE COURT: That's overruled.

18 BY MR. LEGRAND:

19 Q. Go ahead. You can answer, sir.

20 A. Say that question one more time.

21 Q. I'll say it a lot slower.

22 Do you agree, Mr. Barborini, that the Air Force's failure
23 to put Devin Kelley's felony conviction into the NICS database
24 was a substantial factor in Devin Kelley being able to acquire
25 the Ruger AR-556 that he used to shoot everybody at Sutherland

1 Springs?

2 A. That rifle, correct.

3 Q. Okay. And your testimony -- sir, your testimony's a
4 two-prong test, correct --

5 A. Tell me --

6 Q. -- as I understand it?

7 In reading your report -- in reading your report, what I
8 find, sir, is that your report depends on two factors.

9 One, your report talks about all these alternative markets
10 that are out there; correct?

11 A. Correct.

12 Q. Okay. But am I not correct that your report -- before
13 these alternative markets even come into play, Mr. Kelley had
14 to be rejected somewhere from buying a firearm; correct?
15 Doesn't your report assume that?

16 A. Well, it's an alternative market. If he was rejected, he
17 may have gone to that market, or maybe he just would have went
18 to that market anyway. But I don't know what was in his mind,
19 why he would go to an FFL.

20 Q. You don't know that, and I don't want to get into that.
21 My question is very simple.

22 Do you agree Mr. Kelley never had to go to an alternative
23 market? He could go where he wanted; correct?

24 A. He can go to a dealer, yes.

25 Q. And you have no evidence whatsoever that he ever went to

1 an alternative market; correct?

2 A. Correct.

3 Q. And all I'm driving at is that in your report, don't you
4 make it clear that all of these alternative markets aren't
5 really in Devin Kelley's universe unless he gets rejected
6 somewhere trying to buy a gun?

7 A. My report basically just outlines how to get the gun.
8 Yes, he was rejected, he could go there. But he could have
9 gone there anyway. And I don't know what was in Devin
10 Kelley's mind.

11 Q. But if he wasn't rejected, he continued -- he did continue
12 to go to FFLs; correct?

13 A. That is correct.

14 MR. LEGRAND: I'll pass the witness. Thank you.

15 THE COURT: Anything else?

16 MS. CHRISTILLES: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. CHRISTILLES:

19 Q. Mr. Barborini, I'm going to go back through and just talk
20 about, first, Devin Kelley's access to other weapons. And
21 let's start with Michael Kelley and Rebecca Kelley.

22 Did you review certain depositions in this case from
23 Michael Kelley?

24 A. Yes.

25 Q. Okay. Did -- I think you started to say it on

1 cross-examination. You were talking about a weapon of Michael
2 Kelley's that you thought Devin Kelley had access to.

3 Why don't you go ahead and finish that statement now.

4 MR. LEGRAND: Your Honor, we would object. That's
5 not proper redirect.

6 THE COURT: That's overruled.

7 THE WITNESS: I remember he had access -- shoot a
8 Walther .380, a PPK.

9 BY MS. CHRISTILLES:

10 Q. And do you recall Michael Kelley talking about Devin
11 Kelley cleaning his weapons?

12 A. Yes.

13 Q. Do you ever recall looking at any testimony that talked
14 about Devin teaching his mother how to shoot?

15 A. You broke -- I'm sorry. You're broken up.

16 Q. Oh, because I can't remember to turn my microphone up.

17 A. Okay. That's better.

18 Q. That's all right.

19 Do you recall anything about Devin Kelley teaching his
20 mother to shoot better?

21 A. Yes.

22 Q. Now, let's talk about Danielle Kelley's testimony.

23 You reviewed her testimony; correct?

24 A. Yes.

25 Q. Okay. Does she talk about Devin Kelley ever going to any

1 gun shows?

2 A. I'm not sure. I think she makes mention of it, but I just
3 can't recall for -- but I just can't recall. I think she
4 mentioned going to a gun show, but I just don't recall.

5 Q. But I think you did talk about her mentioning a handgun
6 that --

7 A. Oh, she definitely got a handgun from -- Devin Kelley got
8 a handgun from a friend. He didn't like it, so he sold it.

9 And then I noticed further in a report that he said it was
10 a cheap gun and he didn't like it. And then later I noticed
11 the SCCY semiautomatic 9-millimeter pistol that he sold to a
12 pawn shop.

13 So I surmise that may be the gun, because it is a cheap
14 gun compared with the Glock.

15 Q. Do you recall any other weapons that Kelley might have
16 bartered for besides that handgun?

17 A. The shotgun, the 12-gauge shotgun. I believe it was a
18 Maverick shotgun.

19 Q. Do you recall whether or not he got that from an FFL or a
20 non-FFL?

21 A. I believe he got it from a source, a friend.

22 Q. Now, you reviewed some of Michael Kelley's information.

23 Do you recall if Michael Kelley ever mentioned trigger
24 locks when he was interviewed by the Texas Rangers?

25 A. I don't recall that.

1 Q. Now, I want to -- I want to shift to this information
2 about guns purchased while Devin Kelley was in the Air Force.
3 Okay?

4 A. Yes.

5 Q. Counsel talked about some gun purchases at the BX.

6 Do you know what a BX is?

7 A. Yes.

8 Q. What is a BX?

9 A. It's a place you go to get anything from food to clothing.
10 My father-in-law, who was in the military -- went to the BX
11 with him.

12 Q. Okay. So it's a store.

13 And plaintiffs' counsel talked to you about some gun
14 purchases in February of 2012.

15 Do you remember that?

16 A. Yes.

17 Q. Okay. And I think in April of 2012.

18 Do you remember that?

19 A. Yes.

20 Q. Do you know when Devin Kelley would have been prohibited
21 from buying an -- from buying a firearm from an FFL?

22 A. I don't recall -- the date that he was convicted, which I
23 don't recall the exact date.

24 Q. Okay. So you don't know whether or not -- when he
25 purchased those weapons from the BX, whether or not he was

1 prohibited from buying them?

2 A. I can't -- don't know -- don't remember the exact day he
3 was convicted. I think it was '15, maybe.

4 Q. But there would have had to have been a conviction;
5 correct?

6 A. Correct.

7 Q. And you don't have any personal knowledge about why there
8 would have been a call from the BX to OSI, do you?

9 A. No.

10 Q. Now, you were asked about whether or not Devin Kelley
11 could have purchased that AR-556, correct, from the FFL?

12 A. Yes.

13 Q. You're not here to testify about whether Academy legally
14 sold the AR-556 on April 7th, 2016, are you?

15 A. No.

16 MS. CHRISTILLES: One moment, Your Honor.

17 *(Discussion off the record)*

18 MS. CHRISTILLES: Pass the witness, Your Honor.

19 THE COURT: Anything further?

20 MR. LEGRAND: Nothing further.

21 THE COURT: Any further need for this witness?

22 MR. LEGRAND: No, Your Honor.

23 THE COURT: Can he be excused?

24 MS. CHRISTILLES: Yes, Your Honor.

25 MR. LEGRAND: Yes, Your Honor.

1 THE COURT: Thank you, sir. You're excused.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Have we gone through all the witnesses
4 for today now or not?

5 MR. STERN: Yes, Your Honor.

6 THE COURT: So what's the schedule for tomorrow? Is
7 it still just John Donohue?

8 MR. STERN: Just John Donohue.

9 THE COURT: Okay.

10 MR. STERN: And, Your Honor, he's actually on
11 California time. I don't know if that means we could take a
12 little bit -- start a little bit later in the morning.

13 THE COURT: Yeah. Well, considering we're only doing
14 one witness.

15 And we can get through him tomorrow; right?

16 MR. STERN: Oh, I believe so. Absolutely.

17 MR. ALSAFFAR: Definitely. Definitely.

18 MR. STERN: I would think he's actually relatively
19 short.

20 THE COURT: Well, I don't want to give you -- I don't
21 want to give you too late a -- too late of a start time and
22 then all of the sudden we don't do -- finish him up.

23 Start at 10:00, 10:30? Central or --

24 MR. STERN: That works for us.

25 MR. ALSAFFAR: It's your witness, so that's fine with

1 me, but I don't want to --

2 MR. STERN: If we start at 10:30, we'll certainly
3 finish by --

4 MR. ALSAFFAR: I think that's true.

5 MR. STERN: -- I think around lunchtime, frankly.
6 But I don't know.

7 THE COURT: Okay. Then, we'll start 10:30 central
8 for the witness. That will be 8:30 his time. And just
9 Mr. Donohue tomorrow.

10 Then, just planning the rest of the week out, what are we
11 doing for Thursday?

12 MR. STERN: Thursday, we have, in the morning, Erin
13 Higgins, followed by Dr. Bursztajn.

14 Friday morning, we have only Dr. Fox.

15 Monday morning, we have plaintiffs' rebuttal, Dr. Metzner,
16 followed by -- I take it that we will do closing perhaps in
17 the afternoon. We haven't gotten much direction from Your
18 Honor in terms of the length of closing arguments.

19 THE COURT: So why don't I give you -- if we finish
20 up -- under the assumption we finish up Metzner Monday --

21 MR. ALSAFFAR: Yes.

22 THE COURT: -- let's just plan on just Metzner on
23 Monday. You all have time to prepare your closing remarks,
24 and we'll hear those on Tuesday.

25 How much time do you want for closing, Plaintiffs?

1 MR. ALSAFFAR: Your Honor, I don't think we need more
2 than an hour each.

3 THE COURT: What do you think?

4 MR. STERN: Your Honor, can -- I think you heard a
5 lot of mine yesterday, so I think an hour will be sufficient.

6 THE COURT: Okay. So an hour each for closing, and
7 that'll be on Tuesday morning, assuming we remain on this
8 schedule.

9 Very well, then. 10:30 tomorrow morning.

10 *(At the bench off the record)*

11 MR. STERN: Your Honor?

12 THE COURT: Yes.

13 MR. STERN: If I can propose?

14 THE COURT: Yes.

15 MR. STERN: I take it that your ruling with regards
16 to Mr. Barborini's report and supplemental report will hold as
17 it pertains to all the rest of the expert reports as well?

18 THE COURT: Yes.

19 MR. STERN: And the learned treatises as well.

20 THE COURT: Yes.

21 MR. STERN: So what I propose is just to have
22 plaintiffs' counsel and I go through the rest of the
23 outstanding exhibits tonight. And I think we could probably,
24 you know, cut down the vast majority of what's left.

25 THE COURT: That would be appreciated.

1 MR. STERN: Of course.

2 MR. ALSAFFAR: Yeah, I agree.

3 THE COURT: Anything else we need to take up, then,
4 before I leave today?

5 MR. ALSAFFAR: No, Your Honor, not from plaintiffs.

6 MR. STERN: Not from the government.

7 THE COURT: Thank you. We'll see you all 10:30
8 tomorrow morning.

9 * * *

10 *(Overnight recess)*

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I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

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